Supreme Court, U.S.
FILED
FEB 2 1995
OFFICE OF THE CLERK

No. 94-1328

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

LEGAL ECONOMIC EVALUATIONS, INC.;
IBAR SETTLEMENT COMPANY; and
WEIL INSURANCE AGENCY, INC.
Petitioners,
VS.
METROPOLITAN LIFE INSURANCE COMPANY, et al.
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

EUGENE CREW
(Counsel of Record)
DANIEL J. FURNISS
PAUL F. KIRSCH
THEODORE T. HERHOLD
TOWNSEND AND TOWNSEND
KHOURIE AND CREW
One Market Plaza
Steuart Tower, 20th Floor
San Francisco, CA 94105
Telephone: (415) 543-9600

Attorneys for Petitioners

BOWNE OF SAN FRANCISCO, INC. • 343 SANSOME ST. • S.F., CA 94104 • (415) 362-2300

96PP

QUESTIONS PRESENTED

1. Whether competitors who have been excluded from their market by a group boycott in violation of the Sherman Act do not suffer "antitrust injury", as a matter of law, and therefore may not seek redress under the Clayton Act.

2. Whether a federal court is without discretion to abstain from deciding claims within its "exclusive jurisdiction" even though a previously filed State court action presenting issues of substantial importance to the State will likely resolve the parties' dispute.

THE PARTIES

Petitioners are Legal Economic Evaluations, Inc., a California corporation; IBAR Settlement Company, a California corporation; and Weil Insurance Agency, Inc., a California corporation, dba Jerry C. Weil & Associates.

Respondents are Metropolitan Life Insurance Company; Safeco Life Insurance Company; The Prudential Life Insurance Company; Alexander Hamilton Life Insurance Company; Confederation Life Insurance Company of America; Ringler Insurance Agency; Ringler Associates Pacific, Incorporated; Ringler Associates Sacramento, Incorporated; Ringler Associates San Francisco, Incorporated; Ringler Associates Bay Area, Incorporated; Ringler Associates Incorporated dba Ringler Associates of Delaware; and Robert S. Bell; The Structured Settlements Company; and The National Structured Settlements Trade Association.[1]

---

[1] Some defendants have settled and therefore are not respondents to this petition.

STATEMENT PURSUANT TO RULE 29.1

Pursuant to U.S. Supreme Court Rule 29.1, Legal Economic Evaluations, Inc., IBAR Settlement Company, and Weil Insurance Agency, Inc. disclose that there are no parent companies or subsidiaries.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
THE PARTIES	ii
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
A. Factual Background	3
B. Proceedings Below	7
1. Petitioners' State Court Actions	7
2. Petitioners' Federal Court Actions	7
3. The Court of Appeals' Decision	9
C. The Basis For Federal Jurisdiction	9
REASONS FOR GRANTING THE WRIT	10
A. Competitors Excluded From A Market By A *Per Se* Unlawful Group Boycott Necessarily Suffer Antitrust Injury	10
B. This Court Should Grant Certiorari To Establish When Injured Competitors May Enforce The Antitrust Laws	14
C. If An Unlawfully Excluded Competitor May Not Enforce The Antitrust Laws, Significant Harm To Consumers Will Continue Unabated	17
D. The Power Of Federal Courts To Abstain From Determining Claims Within Their "Exclusive Jurisdiction" In Deference To A Previously Filed State Court Action Is An Important Issue Which This Court Has Not Settled	19
CONCLUSION	23

TABLE OF AUTHORITIES CITED

Cases

	Page(s)
Admiral Ins. Co. v. United States Dist. Court, 881 F.2d 1486 (9th Cir. 1989)	19
Aetna Casualty & Surety Co. v. Farrell, 855 F.2d 146 (3d Cir. 1988)	19
Allied Machinery Service, Inc. v. Caterpillar, Inc., 841 F. Supp. 406 (S.D. Fla. 1993)	21
Andrea Theaters, Inc. v. Theater Confections, Inc., 787 F.2d 59 (2d Cir. 1986)	21-22
Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985)	15
Associated General Contractors of California v. California State Council of Carpenters, 459 U.S. 519 (1983)	17
Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990)	9, 10, 12, 13, 14, 15, 16
Bartoli v. Baiunco, 197 N.J. Super. 109 (1984)	5
Blue Shield of Virginia v. McCready, 457 U.S. 465 (1982)	13
Boccardo v. Safeway Stores, Inc., 134 Cal. App. 3d 1037 (1982)	21
Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977)	9, 10, 12, 13
California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972)	18-19
California v. American Stores Co., 495 U.S. 271 (1990)	14
California v. ARC America Corp., 490 U.S. 93 (1989)	20
Caribe BMW v. Bayerische Motoren Werke, 19 F.3d 745 (1st Cir. 1994)	12
Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976)	20, 21, 22

TABLE OF AUTHORITIES CITED

CASES

	Page(s)
Cutler v. Lewiston Daily Sun, 611 F. Supp. 746 (D. Me. 1985)	13
Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927)	15
Eastman-Kodak Co. v. Image Technical Services, Inc., ___ U.S. ___, 112 S. Ct. 2072 (1992)	16
FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986)	10, 11, 17
FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990)	11, 14, 18
Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975)	19
Hartford Fire Insurance Co. v. California, ___ U.S. ___, 113 S. Ct. 2891 (1993)	11, 20
Illinois Brick v. Illinois, 431 U.S. 720 (1977)	17
In re Insurance Antitrust Litigation, 938 F.2d 919 (9th Cir. 1991), *aff'd in part, reversed in part, Hartford Fire Insurance Co. v. California*, ___ U.S. ___, 113 S. Ct. 2891 (1993)	8
Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409 (7th Cir. 1989)	14
Kartell v. Blue Shield of Mass., Inc., 592 F.2d 1191 (1st Cir. 1979)	21
Klein v. Walston & Co., 432 F.2d 936 (2nd Cir. 1970)	21
Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959)	15
Legal Economic Evaluations, Inc. v. Metropolitan Life Ins. Co., 39 F.3d 951 (9th Cir. 1994)	*passim*
Lorentzen v. Levolor Corp., 754 F. Supp. 987 (S.D.N.Y. 1990)	21
Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959)	20

TABLE OF AUTHORITIES CITED

CASES

Page(s)

Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948) 13, 18

Manufacturers Life Ins. Co. v. Superior Court, 27 Cal. App. 4th 67 (1994) 7

Medema v. Medema Builders, Inc., 854 F.2d 210 (7th Cir. 1988) 21

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614 (1985) 14-15

Movie 1 & 2 v. United Artists Communications, Inc., 909 F.2d 1245 (9th Cir. 1990), *cert. denied*, 501 U.S. 1230 (1991) 12

National Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85 (1984) 17-18

Ramirez v. USAA Casualty Ins. Co., 234 Cal. App. 3d 391 (1991) 19

Reiter v. Sonotone Corp., 442 U.S. 330 (1979) 15

Thompson v. Metropolitan Multi-List, Inc., 934 F.2d 1566 (11th Cir. 1991), *cert. denied*, ____ U.S. ____, 113 S. Ct. 295 (1992) 14

United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) 18

Weil Ins. Agency v. Manufacturers Life Ins. Co., 815 F. Supp. 1320 (N.D. Cal. 1993) ..... *passim*

Will v. Calvert Fire Insurance Co., 437 U.S. 655 (1978) 21

Yellow Pages Cost Consultants, Inc. v. GTE Directories Corp., 951 F.2d 1158 (9th Cir. 1991), *cert. denied*, ____ U.S. ____, 112 S. Ct. 1947 (1992) 13-14

Statutes

15 U.S.C. § 1 2

TABLE OF AUTHORITIES CITED

STATUTES

	Page(s)
15 U.S.C. § 2	2
15 U.S.C. § 15	2, 15
15 U.S.C. § 1011	20
15 U.S.C. § 1012	9
15 U.S.C. § 1013(b)	9
28 U.S.C. § 1254(1)	2
United States Supreme Court Rule 10.1(c)	20
Federal Rules of Civil Procedure, Rule 26	19
California Business & Professions Code § 16700 *et seq.*	7
California Insurance Code § 332	19
California Insurance Code § 790 *et seq.*	7
New Jersey Court Rules, 1969 R. 1:21-7 (1994)	5

Other Authorities

Advisory Committee Notes to former Rule 26(b)(2) of the Federal Rules of Civil Procedure, 1970 Amendment	19
Areeda, P. and H. Hovenkamp, *Antitrust Law*, ¶ 334.3 (Supp. 1991)	11, 13
Areeda, P. and H. Hovenkamp, *Antitrust Law*, ¶ 340.2 (Supp. 1993)	11, 12
Areeda, P. and H. Hovenkamp, *Antitrust Law*, ¶ 373a (Supp. 1994)	12
Bork, R. H., *The Antitrust Paradox* (1978)	18
Burns, J., *The Paradox of Antitrust and Lanham Act Standing*, 42 U.C.L.A. L. Rev. 47 (1994)	12, 16
Flynn, J., *Which Past is Prolog? The Future of Private Antitrust Enforcement*, 35 Antitrust Bull. 879 (1990)	15-16

TABLE OF AUTHORITIES CITED

OTHER AUTHORITIES

	Page(s)
Gerla, H., *Federal Antitrust Law and the Flow of Consumer Information*, 42 Syracuse L. Rev. 1029 (1991)	18
Hawker, N., *The New Antitrust Paradox: Antitrust Injury*, 44 Rutgers L. Rev. 101 (1991)	15-16
Malina, M. and R. Steuer, *Trial Lawyers and ARCO: Jurisprudentially Inconsistent Approaches to Per Se Illegality*, 59 Fordham L. Rev. 773 (1991)	14
Snyder, E. & T. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 Mich. L. Rev. 551 (1991)	11
Solimine, M., *Rethinking Exclusive Federal Jurisdiction*, 52 U. Pitt. L. Rev. 383 (1991)	22
Wright, Miller & Cooper, *Federal Practice and Procedure:* 17A Jurisdiction 2d § 4241 (1988)	22

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

LEGAL ECONOMIC EVALUATIONS, INC.;
IBAR SETTLEMENT COMPANY; and
WEIL INSURANCE AGENCY, INC.
Petitioners,
VS.
METROPOLITAN LIFE INSURANCE COMPANY, et al.
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on November 2, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 39 F.3d 951 and appears as Appendix A to this Petition. The opinion of the District Court is reported at 815 F. Supp. 1320 and appears as Appendix B to this Petition.

JURISDICTION

The Court of Appeals entered its judgment on November 2, 1994. The Court of Appeals denied a timely petition for rehearing and suggestion for rehearing en banc on December 15, 1994 (Appendix E hereto [hereafter designated as "App."]). On December 19, 1994, petitioners moved the Ninth Circuit for a stay pending submission of this petition for writ of certiorari. The Ninth Circuit granted the motion and stayed its mandate for 30 days by order dated January 3, 1995. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1 of the Sherman Act (15 U.S.C. § 1) provides in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in the restraint of trade or commerce . . . is declared to be illegal."

Section 2 of the Sherman Act (15 U.S.C. § 2) provides in relevant part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, . . . shall be deemed guilty of a felony."

Section 4 of the Clayton Act (15 U.S.C. § 15) provides in relevant part: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue thereof . . . and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorneys' fee."

STATEMENT OF THE CASE

A. Factual Background

This case involves a nationwide group boycott perpetrated against petitioners by several competing life insurers and brokers in the market for annuities used to fund the structured settlement of personal injury litigation. (Excerpts of Record[2] I:1-46, 47-65, 66-86.)

Beginning in the late 1970s, parties to tort actions turned with increasing frequency to structured settlements as a means of resolving their disputes and used annuities to fund those settlements. (ER I:9.) A structured settlement annuity is sold by brokers representing life insurance companies only after the tort plaintiff (often a totally incapacitated negligence victim) agrees to release her claim against a tort defendant (generally represented by a liability insurer) in exchange for the deferred payments of the annuity over subsequent years. (ER III:816; IV:905, 917, 1013.) This device has become a major industry, today representing premium and commission revenues to respondents of several billion dollars annually. (ER I:9-10; ER IV:951; ER VI:1579-1580.) Because a tort victim (1) must decide whether to accept the structured settlement annuity, (2) receives the annuity payments and (3) gives up valuable consideration (i.e., release of her injury claim) for the annuity, she is legally a "creditor beneficiary" and — for antitrust purposes — the "consumer" of the annuity that is the subject of this case. (ER III:638, 733, 816; IV:905, 916-917, 983, 1013.)

Petitioners are three brokers located in California who, during the 1980s, successfully competed in the structured settlement annuity market by providing consulting services

---

[2]All Excerpts of Record or "ER" citations refer to the excerpts submitted in the Ninth Circuit.

and annuities to either tort plaintiffs or tort defendants in settlement of their disputes. (ER I:2-3, 8, 14-16, 48, 50, 67, 70-71.) Respondents are virtually all of the life insurers and broker organizations who had marketed annuities exclusively to tort defendants and their liability insurers for use in settling the injury claims of tort plaintiffs. (ER I:3-7, 49-50, 69-70.) Pursuant to the conspiracy alleged herein, respondents boycotted any broker who attempted to compete in the structured settlement annuity market by providing tort plaintiffs full, accurate and reliable information needed to properly evaluate the annuity being offered to settle their claims. (ER I:11-14, 53, 55-56, 73, 76-77.)

Respondents' conspiracy was hatched from the realization that if the entire market refused to provide tort plaintiffs with the critical annuity rate information they would need to ensure the annuity offered them was adequate, respondents could help liability insurers depress the value of annuities sold in settlement of injury claims. (ER I:9-10; IV:1004-1009, 1100-1104; V:1474-1475.) This depression in annuity benefits (and thus costs) made annuities more attractive to liability insurers whereas tort plaintiffs did not know enough to object because respondents' "information blackout" kept tort plaintiffs in the dark concerning the annuity's true value. (ER I:16-20; III:827-828, 831-833; IV:911-914, 926, 997, 1057-1061, 1130-1133; V:1413, 1466; VI:1530, 1533, 1538, 1581.) Hence respondents (in part through respondent National Structured Settlements Trade Association) jointly adopted and implemented an industrywide policy which prohibited all market participants (life insurers and brokers alike) from providing tort plaintiffs with any information regarding the price of the annuity which tort plaintiffs were being asked to accept in settlement of their claims. (ER I:10-12; IV:923-924, 995-957; V:1411-1413, 1423-1442, 1474-1475, 1488-1489.)

Petitioners disagreed with respondents' restrictive marketing tactics, regarding them as deceptive and unfair, and therefore chose not to comply. (ER I:14-16, 54-56; III:819-820; IV:920-921; VI:1577-1580.) Without full disclosure of relevant annuity information, petitioners observed, tort plaintiffs could not intelligently determine whether the settlement was adequate. (ER I:74-76; III:640-642, 817, 825; IV:906, 924, 949-951, 994.) Respondents regularly used their concerted "information blackout" to misrepresent the annuity premium and exaggerate the "present value" of the annuity payout.[3] (ER III:739-740, 749, 676; IV:953-954; VI:1567.) Petitioners thus saw an opportunity to compete with respondent brokers by marketing annuities to the tort victims since tort victims have to approve the annuity purchase in settlement of their injury claims. By marketing annuities directly to tort plaintiffs with accurate, complete and reliable information regarding annuity prices and benefits, petitioners gained their clients' trust and thus became extraordinarily successful (albeit temporarily) in their efforts to compete against respondent brokers — who were conspiring with respondent life insurers to deprive tort plaintiffs of information critical to their purchase decisions. (ER I:14-16; III:820; IV:906, 920-921.)

For awhile, before respondents' "conspiracy of silence" was implemented, petitioners succeeded in the market because tort plaintiffs served by petitioners appreciated the

---

[3]It is deemed professional malpractice in some states for a plaintiff's lawyer to negotiate a structured settlement funded by an annuity without ascertaining the annuity price (See, eg., N.J. Court Rules, 1969 R. 1:21-7 (1994); *Bartoli v. Baiunco*, 197 N.J. Super. 109 (1984) (plaintiff attorneys should require annuity price information during settlement negotiations)). However, respondents' conspiracy rendered that critical information unavailable. Further, to excuse their concealment, respondents falsely informed tort plaintiffs that if they had knowledge of annuity prices before the settlement was finalized, they would lose the tax advantages of a structured settlement. (ER VI:1547-1555.)

fuller and more reliable information at lower prices which petitioners offered them.[4] (ER III:820; IV:906, 920-921, 951; VI:1579-1580.) But this was of short duration. Respondents were resentful of petitioners' competitive success so they jointly refused to deal with petitioners as long as petitioners chose to compete by dealing with tort plaintiffs. (ER I:16-20, 55-57, 76-78; III:733-734, 820-821; IV:921, 923-924, 949-951, 994; VI:1577-1580.) Because petitioners refused to renounce their freedom to compete and chose instead to continue dealing with tort plaintiffs, respondents jointly evicted petitioners from the annuity market by denying them access to the annuity price information they needed to compete. As a result: (1) petitioners' rapidly growing businesses were substantially destroyed and (2) countless tort plaintiffs were either (a) deceived into unfair

---

[4] In order to accurately value a structured settlement offer, tort victims must have access to accurate information concerning annuity prices. It is undisputed that mere "present value" calculations of annuity payouts often depict inaccurate, inflated values of settlement offers and thus conceal the true value of the annuity. (ER III:816-818, 827, 844; IV:905, 919-920, 974, 977-978, 981-982.) To illustrate:

> Assume an injury victim's claim has a cash value of $1.5 million and the parties agree to settle with a lump sum payment of $500,000 and the balance to be "structured" with an annuity payable over the injury victim's life. The injury victim's attorney would naturally expect the liability insurer to invest the entire $1 million in the annuity for her client. But — because of respondents' "information blackout" — the injury victim and her attorney do not know the annuity's true price (e.g., $800,000). As a consequence, the liability insurer secretly purchases the inferior annuity at a discount for the injury victim and pockets the difference as a profit from the victim's misfortune and lack of information.

Respondents' scheme may be likened to a conspiracy among real estate sellers and their brokers to refuse to deal with brokers for real estate buyers for the purpose of concealing title reports from buyers and thereby artificially distorting the price to be paid by them for the real estate.

settlements through lack of critical information concertedly withheld from them by respondents or (b) forced to forego settlement entirely for lack of needed information, thereby decreasing the volume of voluntary settlements and correspondingly increasing the burden on our courts. (ER I:20, 55-57, 76-78; III:733-734, 820-821, 827-828, 831-833; IV:911-914, 923, 926, 951-954, 968, 978, 1005-1009, 1057-1061, 1100-1104; VI:1530, 1538, 1579-1581.) Petitioners' brief success demonstrates how the structured settlement annuity market would have flourished but for respondents' boycott.

B. Proceedings Below

1. Petitioners' State Court Actions

This controversy began when petitioners filed complaints in the California state court in 1989-1991, alleging that respondents' boycott of petitioners violated California's antitrust law (California Business and Professions Code § 16700 *et seq.*). Respondents successfully demurred to petitioners' complaint, the state trial court holding that — as a result of California's 1959 adoption of the model Unfair Insurance Practices Act (California Insurance Code § 790 *et seq.*) — the California Insurance Commissioner had "exclusive jurisdiction" over respondents' alleged violations of California's antitrust law. Petitioners appealed and, in July 1994, the state appellate court reversed the trial court and remanded petitioners' actions for trial. (*Manufacturers Life Ins. Co. v. Superior Court*, 27 Cal. App. 4th 67 (1994) (App. F).) Subsequently, the California Supreme Court granted respondents' petition for review of the lower appellate court's decision. (App. G.) That review has not yet been argued.

2. Petitioners' Federal Court Actions

After the state trial court dismissed petitioners' antitrust claims for lack of jurisdiction and before those dismissals

were reversed by the state appellate court, petitioners commenced these actions under the Sherman Act in the court below. (ER I:1-46, 47-65, 66-86.) While petitioners had preferred to prosecute their antitrust claims in state court under state law, they had been denied that remedy on jurisdiction grounds yet believed the federal court — because of *In re Insurance Antitrust Litigation*, 938 F.2d 919 (9th Cir. 1991), aff'd in part, reversed *in part*, *Hartford Fire Insurance Co. v. California*, ____ U.S. ____, 113 S. Ct. 2891 (1993) — would not refuse jurisdiction to hear their boycott claims under the Sherman Act. Petitioners therefore commenced their federal actions under the Sherman Act to protect against the statute of limitations but promptly moved to stay their actions so as to allow the state appellate court the opportunity to rule on the jurisdiction issue presented by petitioners. (ER II:457.)

In response to petitioners' motion to stay their action pending resolution of the jurisdiction issue by the state appellate court, respondents moved for summary judgment alleging their admitted boycott of petitioners did not cause petitioners "antitrust injury." (ER II:358.) The district court denied petitioners' motion to stay because, it declared, it was powerless to stay prosecution of a Sherman Act claim (even on petitioners' motion) as to which the district court had "exclusive jurisdiction." (App. C at A-23.) The district court then granted respondents' motion for summary judgment, holding that — as a matter of law — neither petitioners (as competitors in the annuity market) nor tort plaintiffs (as consumers in the annuity market) suffered "antitrust injury" as a result of respondents' group boycott. (815 F. Supp. at 1324, App. B at A-16-17.) The court also held that petitioners and respondents sell annuities to settle tort litigation and that annuities used in the settlement of litigation

cannot be a legally cognizable market subject to the antitrust laws:

> The purpose of the antitrust laws is 'the prevention of restraints to free competition in business and commercial transactions.' *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493, 60 S.Ct. 982, 992, 84 L.Ed. 1311 (1940). The antitrust laws are not intended to regulate negotiations between adversaries in litigation.

815 F. Supp. at 1324 (App. B at A-16-17).[5]

3. The Court of Appeals' Decision

In affirming the District Court's summary judgment in respondents' favor, the Court of Appeals "did not reach" the lower court's ruling that annuity funded structured settlements of tort litigation do not constitute a legally cognizable market for antitrust purposes. Instead it cited *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), and *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990) ("*ARCO*"), to hold that petitioners' exclusion from the annuity market as a result of respondents' group boycott is not, as a matter of law, "antitrust injury" and that any injury caused by respondents' admitted boycott was caused to "tort plaintiffs . . . in the market for settling litigation." (39 F.3d at 955, App. A at A-8.)

C. The Basis For Federal Jurisdiction

The basis for federal jurisdiction here is the "group boycott" exception to the McCarran-Ferguson Act, i.e., sections 2 and 3(b) of the Act (15 U.S.C. § 1012, 1013(b)).

---

[5]Subsequently, the district court dismissed petitioners' state law claims without prejudice. (App. D.)

REASONS FOR GRANTING THE WRIT

If this decision from the largest Circuit in the United States is allowed to stand, competitors excluded from a market by a nationwide *per se* unlawful group boycott would be denied standing to complain because — as a matter of law — they did not suffer "antitrust injury." The decision is not merely wrong; it is a dangerous extension of the "antitrust injury" doctrine first enunciated by this Court in *Brunswick* and later expanded in *ARCO* and demonstrates how that cryptic doctrine has bedeviled both courts and litigants in their ongoing struggle to interpret and enforce the antitrust laws. By relying upon this Court's decisions in *Brunswick* and *ARCO* to hold that boycotted competitors suffer no antitrust injury, the Ninth Circuit's decision — unless corrected by this Court — could eliminate all private antitrust enforcement by injured competitors. If the "boycottee" cannot prove "injury of the type which the antitrust laws [forbidding boycotts] were intended to prevent" (*Brunswick*, 429 U.S. at 489), who can? Moreover, when boycotted competitors are unable to invoke the antitrust laws, consumers are necessarily harmed. Because the Ninth Circuit has allowed the group boycott of a competitor who provided critical information to the market, annuity consumers will continue to be subjected to tort litigation settlements that have been distorted by respondents' collusive suppression of critical information from them — inevitably discouraging the voluntary settlement of costly tort litigation by forcing the parties to trial. *See FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986).

A. Competitors Excluded From A Market By A *Per Se* Unlawful Group Boycott Necessarily Suffer Antitrust Injury

On this summary judgment record, it is undisputed that respondents (1) conspired to withhold critical information

from annuity consumers (2) for the purpose of depressing the compensation paid them for their injuries and (3) boycotted petitioners in furtherance of their output suppression and price fixing scheme. In short, respondents boycotted petitioners because petitioners' marketing practice of providing annuity price and coverage information to annuity consumers proved to be an effective method of competing in the annuity market — a competitive practice which respondents conspired among themselves not to employ. Respondents' conduct is indisputably a violation of the antitrust laws. *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 457 (1986); *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 429-432 (1990) (group boycott to enforce price fixing is *per se* illegal); *See also, Hartford Fire Insur. Co. v. California*, ____ U.S. ____, 113 S. Ct. 2891, 2916-2917 (1993) (unlawful boycott by insurers). There was no denial by respondents or the court below that respondents' violations caused petitioners injury. The only question — decided by the court below on summary judgment and presented by this petition for certiorari — is whether petitioners' acknowledged injury constituted "*antitrust* injury."

The lower court's decision, i.e., that petitioners' exclusion from the market by respondents' unlawful boycott does not constitute antitrust injury, is clear error. Respected antitrust pundits routinely cited by the Court with approval recognize this. P. Areeda and H. Hovenkamp, *Antitrust Law*, ¶ 340.2 at 483-484 (Supp. 1993); E. Snyder & T. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 Mich. L. Rev. 551, 583 (1991). Professors Areeda and Hovenkamp stress:

> [T]he most likely [antitrust] enforcer is the immediate victim of the illegal conduct — namely, the competitor weakened or ruined by the improper conduct. . . . The rationale for the prohibition of predatory behavior is not only concern for the ultimate consequence of monopoli-

> zation but also concern for the intermediate protection of the competitive process. The immediate victim's injury flows from the reason for making the predatory conduct unlawful and thus constitutes antitrust injury.

P. Areeda and H. Hovenkamp, *Antitrust Law* ¶ 340.2, at 483-484 (Supp. 1993).[6]

In holding that a competitor excluded from the market by a group boycott does not suffer antitrust injury, the Ninth Circuit relied upon *Brunswick* and *ARCO* but — in doing so — directly contradicted the rationale of those decisions. *ARCO* held that a competitor injured by defendants' maximum resale price fixing scheme did not suffer "antitrust injury" notwithstanding defendants' *per se* violation. (495 U.S. at 1891-1892.) *ARCO* nonetheless recognized that a victim of predatory actions by its competitor would suffer antitrust injury. (495 U.S. at 339.)[7] Disregarding that, the court below invoked *ARCO* to hold that competitors injured by respondents' group boycott cannot suffer antitrust injury. (39 F.3d at 954, App. A at A-6.)

---

[6] *See also*, P. Areeda and H. Hovenkamp, *Antitrust Law* ¶ 373a at 275 (Supp. 1994) (a competitor has "clear standing to challenge the conduct of rival(s) that is illegal precisely because it tends to exclude rivals from the market"); J. Burns, *The Paradox of Antitrust and Lanham Act Standing*, 42 U.C.L.A. L. Rev. 47, 73 (1994) (antitrust standing should be routinely allowed when competitor unlawfully excluded from market.)

[7] *See also, Caribe BMW v. Bayerische Motoren Werke*, 19 F.3d 745, 753 (1st Cir. 1994) (firm injured by defendants' anticompetitive conduct has suffered "antitrust injury" under *ARCO*); *Movie 1 & 2 v. United Artists Communications, Inc.*, 909 F.2d 1245, 1253 (9th Cir. 1990), *cert. denied*, 501 U.S. 1230 (1991) (in cases of "group boycotts that directly or indirectly cut off necessary access to customers or suppliers the per se rule applies because the likelihood of antitrust injury is clear.").

Moreover, this plain error is the inevitable result of an ambiguous doctrine — "antitrust injury" — which sprung into existence in 1977 with *Brunswick* and grew larger in 1990 with *ARCO* and now confounds both courts and litigants in their ongoing efforts to decide who may and who may not complain. *See, e.g.*, P. Areeda & H. Hovenkamp, *Antitrust Law*, ¶ 334.3 at 377 (Supp. 1991); *Cutler v. Lewiston Daily Sun*, 611 F. Supp. 746, 751 (D. Me. 1985) (antitrust injury is "beleaguered by doctrinal confusion"). A cursory review of appellate court decisions concerning the related doctrines of antitrust injury and standing demonstrates that it is no longer possible for a competitor injured by conduct which violates the antitrust laws to know whether it may seek redress from our courts. *Mandeville* pronounced: "The [Sherman Act] does not confine its protection to consumers, or to purchasers, or to sellers. . . . The Act is comprehensive in its coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated (citations omitted)." *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948). *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), held that any plaintiff, including a competitor, could sue if its injury was "inextricably intertwined" with defendants' violation. 457 U.S. at 483-484. *Brunswick* and *ARCO*, on the other hand, both held that competitors did not suffer "antitrust injury" and thus could not sue despite a violation of the antitrust laws because the injury plaintiffs suffered did not derive from an "anticompetitive aspect" of defendants' violation.

As a result, the lower courts' application of the "antitrust injury" doctrine to competitors is inconsistent and unpredictable. *E.g.*, compare, *Yellow Pages Cost Consultants, Inc. v. GTE Directories Corp.*, 951 F.2d 1158, 1162 (9th Cir. 1991), *cert. denied*, ____ U.S. ____, 112 S. Ct. 1947 (1992) (advertising brokers suffered antitrust injury from refusal to deal since they competed in the same market for sales with

defendants) and *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1572 (11th Cir. 1991), *cert. denied*, ____ U.S. ____, 113 S. Ct. 295 (1992) (real estate broker suffered antitrust injury from a group boycott preventing him from having access to critical information in multiple listing) with *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1419-1420 (7th Cir. 1989) (competitor did not suffer antitrust injury from horizontal price fixing conspiracy) and the decision below (competitors did not suffer antitrust injury from horizontal conspiracy to exclude them). The lower court's decision plainly conflicts with the rationale of *ARCO*. Unless this Court grants certiorari to cure the Ninth Circuit's perversion of *ARCO* and clarify the "antitrust injury" doctrine, many competitor actions will be wrongly dismissed because lower courts will have no way to distinguish those victims of *per se* violations who have suffered antitrust injury (as here) from those victims of *per se* violations who have not (as in *ARCO*).[8]

B. This Court Should Grant Certiorari To Establish When Injured Competitors May Enforce The Antitrust Laws

Despite the many changes in substantive antitrust law over the past twenty years, private antitrust enforcement is still regarded as an important safeguard of antitrust policy. *See, e.g., California v. American Stores Co.*, 495 U.S. 271, 284 (1990) (private enforcement is integral part of antitrust law); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*

---

[8] Further, commentators have argued that *Superior Court Trial Lawyers* and *ARCO*, both decided by this Court in 1990, are flatly inconsistent. M. Malina and R. Steuer, *Trial Lawyers and ARCO: Jurisprudentially Inconsistent Approaches to Per Se Illegality*, 59 Fordham L. Rev. 773, 790 (1991). The lower court's decision here, that competitors directly injured by a boycott imposed to fix prices did not suffer antitrust injury,' epitomizes the struggle to rationalize these Supreme Court decisions.

Inc., 473 U.S. 614, 635 (1985) ("The treble damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators"); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) ("Congress created the treble damage remedy . . . precisely for the purpose of encouraging private challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations."). Accord, *ARCO*, 495 U.S. at 360 (Justice Stevens, dissenting: "Private actions not only compensate the injured but deter wrongdoers."). Given the current legislative movement to reduce federal government services, potentially reducing the Justice Department's limited resources to prosecute antitrust violators even further, private enforcement of antitrust policy is especially critical today.

Prior to *ARCO*, courts routinely accorded any competitor who was excluded from the market by an unlawful refusal to deal the right to seek redress under section 4 of the Clayton Act (15 U.S.C. § 15).[9] But now, because of the Ninth Circuit's summary application of *ARCO*, any competitor excluded from the market by an unlawful refusal to deal (whether concerted or unilateral) will assuredly be excluded from the court as well on defendant's motion for summary judgment because that competitor will be unable to "link its own injury to the anticompetitive aspect of defendants' conduct" (39 F.3d at 954, App. A at A-6), citing *ARCO*, and therefore cannot show antitrust injury.[10] Some com-

---

[9] *See, e.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927).

[10] See N. Hawker, *The New Antitrust Paradox: Antitrust Injury*, 44 Rutgers L. Rev. 101 (1991) (antitrust injury doctrine curtails actions

mentators have argued that *ARCO* "can be read as saying that competitors have no standing because the antitrust laws only protect consumers." J. Flynn, *Which Past is Prolog? The Future of Private Antitrust Enforcement*, 35 Antitrust Bull. 879, 915 (1990). The decision below reflects this interpretation.[11]

The lower court's perversion of *ARCO* is enough by itself to warrant certiorari. But it compounded its disregard of that Supreme Court precedent by also ruling, as a matter of law on summary judgment, that petitioners did not compete in the market from which respondents admit petitioners were excluded. *See, e.g., Eastman-Kodak Co. v. Image Technical Services, Inc.*, ___ U.S. ___, 112 S. Ct. 2072, 2090 (1992) (market definition can be determined only after a factual inquiry into the "commercial realities" faced by consumers). Nor did the lower court stop there. It further ruled that, in any event, antitrust injury to consumers in the annuity market precludes antitrust injury to competitors in that same market: "Thus, even if price fixing of structured settlements injures tort plaintiffs and restriction on output increases the cost of annuities . . . [petitioners'] injury does not flow from these competitive harms." (39 F.3d at 955, App. A at A-7.) If this decision were allowed to stand no competitor would be able to show antitrust injury from defendants' violation of the antitrust laws if a defendant's violation also injured consumers.

If petitioners — *qua* competitors — may not recover the damages they have sustained as a result of defendants' group boycott, who can? The liability insurers obviously will not sue (and notably have not) because they stand to profit from

---

by competitors to enforce *per se* antitrust violations, thereby frustrating important goal of private enforcement.)

[11] See also, J. Burns, *The Paradox of Antitrust and Lanham Act Standing*, 42 U.C.L.A. L. Rev. 47, 93, n. 200 (1994) ("current antitrust rules act to eliminate virtually all competitor lawsuits").

respondents' unlawful scheme. The annuity consumers (tort plaintiffs) do not even know of the antitrust violation or of the resulting harm to them precisely *because* respondents have conspired to conceal annuity price information from them so as to distort their settlements. Hence they understandably have not sued for redress either. Finally, even if tort plaintiffs (who are third party creditor beneficiaries of the annuity purchased by the liability insurers in settlement of their injury claims) were to discover the violation and the harm it caused them, the court below has decreed them outside the relevant market. (39 F.3d at 955, App. A at A-7.) Consequently, they would not have standing under *Associated General Contractors of California v. California State Council of Carpenters*, 459 U.S. 519 (1983) and *Illinois Brick v. Illinois*, 431 U.S. 720 (1977). This leaves petitioners, excluded competitors, as the only market participants in a position to enforce the antitrust laws against respondents' boycott.

C. If An Unlawfully Excluded Competitor May Not Enforce The Antitrust Laws, Significant Harm To Consumers Will Continue Unabated

The court below acknowledged that respondents' collusive actions caused harm to consumers — *i.e.*, tort plaintiffs who surrendered their injury claims in return for a structured settlement annuity — but dismissed it as irrelevant because "that harm arises in the market for settling litigation." (39 F.3d at 955, App. A at A-8.) Respondents' conspiracy to withhold critical rate information from annuity consumers plainly suppressed the output of that information, ultimately reducing annuity sales and thereby harming consumers. *See, e.g., FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 457 (1986); *National Collegiate Athletic Ass'n v. Bd. of*

Regents, 468 U.S. 85, 107 (1984).[12] Since both the purpose and the effect of respondents' "information blackout" was to distort and depress the value of annuities used to settle tort victims' injury claims, harm to annuity consumers as a result of respondents' price fixing conduct is conclusively presumed. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948). Finally, respondents' boycott of petitioners—to further their output suppression and price fixing scheme—harms both competitors and consumers as a matter of law. *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990).[13]

In its published opinions the District Court expressly held and the Court of Appeal clearly implied that even if respondents' actions caused harm to both competitors and consumers in the annuity market, that harm was not cognizable under the antitrust laws because it occurred in the course of settling tort litigation and the supply of goods or services to facilitate court settlements is not "commerce" subject to the antitrust laws. (815 F. Supp. at 1324, App. B at A-16; 39 F.3d at 955, App. A at A-7-8.) As the District Court declared: "the tort plaintiffs' injury is not the type of injury the antitrust laws were designed to prevent." (815 F. Supp. at 1323, App. B at A-16.) This directly conflicts with *FTC v. Superior Court Trial Lawyers Ass'n, supra; California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510-

---

[12] *See also*, H. Gerla, *Federal Antitrust Law and the Flow of Consumer Information*, 42 Syracuse L. Rev. 1029, 1030, 1032 (1991) ("false or misleading information is dead weight economic loss, causing injury without any offset economic benefit. . . . Withholding information will almost always injure competition by making it more difficult for consumers to exploit the normal rivalry that exists between competitors.").

[13] *See also*, R. H. Bork, *The Antitrust Paradox*, 335 (1978) (naked boycotts carry no possible benefit to consumer).

11 (1972), and *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787-88 (1975), all of which applied the antitrust laws to restraints which subverted the litigation process. Surely a conspiracy by nonlitigants to prevent "full disclosure" (*see, e.g.*, Rule 26 of Federal Rules of Civil Procedure) of annuity information needed by settling litigants does not deserve special protection from the antitrust laws.[14] Hence the clear harm to *both* competitors *and* consumers which respondents' actions have caused will continue unabated if the Ninth Circuit's decision is allowed to stand. This is because, as discussed above, neither competitors nor consumers in the structured settlement annuity market would be able to seek antitrust redress.

D. The Power Of Federal Courts To Abstain From Determining Claims Within Their "Exclusive Jurisdiction" In Deference To A Previously Filed State Court Action Is An Important Issue Which This Court Has Not Settled

This case also presents an important question of federal procedure which "has not been, but should be, settled by

---

[14]The district court's summary judgment rested on the premise that prices charged by life insurance companies (third parties to tort litigation) constitute "attorney work product." This is false. *See e.g., Aetna Casualty & Surety Co. v. Farrell*, 855 F.2d 146, 146, n.1 (3d Cir. 1988) (annuity prices were discoverable under former Federal Rule of Civil Procedure 26(b)(2)); *see also*, Advisory Committee Notes to former Rule 26(b)(2) of the Federal Rules of Civil Procedure, 1970 Amendment ("settlement [should be] based on knowledge and not speculation"); *see also, Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486, 1494 (9th Cir. 1989). Moreover, under state law, life insurers and brokers have a duty to accurately inform annuity consumers of all material facts, including prices, related to annuity policies during settlement negotiations. California Insurance Code § 332; *Ramirez v. USAA Casualty Ins. Co.*, 234 Cal. App. 3d 391, 399 (1991) (insurer must disclose all policy terms to prospective insured because of duty of good faith and fair dealing inherent in negotiation of insurance policies).

this Court."[15] Petitioners' motion to stay these federal actions required consideration of important conflicting interests — including a federal court's duty to exercise its "exclusive jurisdiction," principles of comity, and the wise and efficient administration of the courts. *See, e.g., Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

Congress and the Supreme Court have both recognized the issues presented by petitioners' state court actions — *i.e.,* the nature and extent of a state's regulation of insurance and the breadth and scope of a state's antitrust laws — are especially important to the states.[16] The Ninth Circuit wrongly refused to recognize that abstention may be appropriate when difficult questions of state policy are present (*Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 79 (1959)), even though claims are labelled "exclusively" within the federal court's jurisdiction. Moreover, the Ninth Circuit's ruling condones the District Court's gratuitous determination of issues that were presented first in state court — where all parties, including respondents, expected the issues to be decided.[17] Petitioners believe this Court should grant certiorari to correct the Ninth Circuit's error with respect to "antitrust injury" for the reasons stated above. But if this Court were to leave that error undisturbed,

---

[15] U.S. Supreme Court Rule 10.1(c).

[16] 15 U.S.C. § 1011 (declaration of Congressional policy for the McCarran-Ferguson Act); *Hartford Life Ins. Co. v. California*, ____ U.S. ____, 113 S. Ct. 2891, 2921 (1993); *California v. ARC America Corp.*, 490 U.S. 93 (1989).

[17] Before they moved for summary judgment, respondents repeatedly agreed with petitioners that a stay of the federal actions was appropriate. However, respondents swiftly reversed their position and moved for summary judgment as soon as the California Attorney General filed an *amicus* brief on behalf of the California Insurance Commissioner which supported petitioners in the State Court of Appeal.

respondents have expressly threatened to invoke the collateral estoppel consequences of that erroneous decision to bar petitioners' state antitrust claims and thereby deprive the state court of the opportunity to address petitioners' state antitrust claims on their merits.[18]

The Ninth Circuit decided, contrary to many courts in other Circuits, that a District Court has no discretion to stay claims within its "exclusive jurisdiction." (39 F.3d at 953, App. A at A-3.) *See, Will v. Calvert Fire Insurance Co.*, 437 U.S. 655, 674 (1978) (recognizing this as an open question); *see also Klein v. Walston & Co.*, 432 F.2d 936, 937 (2nd Cir. 1970) (district court appropriately stayed federal securities action); *Lorentzen v. Levolor Corp.*, 754 F. Supp. 987, 993-994 (S.D.N.Y. 1990) (federal securities claims could be stayed even though they fall within the exclusive jurisdiction of the federal courts); *Allied Machinery Service, Inc. v. Caterpillar, Inc.*, 841 F. Supp. 406, 408-410 (S.D. Fla. 1993) (granting plaintiff's application for stay of federal antitrust claims by observing the "question of abstention and exclusive jurisdiction is unsettled ... the courts that have confronted the issues have reached conflicting results"); *Kartell v. Blue Shield of Mass., Inc.*, 592 F.2d 1191, 1194 n.5 (1st Cir. 1979) (abstention may be justified in an antitrust action where the requirements of *Colorado River*'s other categories are satisfied); But see, *Medema v. Medema Builders, Inc.*, 854 F.2d 210, 214-15 (7th Cir. 1988) (*Colorado River* abstention not available when claims are within federal court's exclusive federal jurisdiction); *Andrea Theaters, Inc. v. Theater Confections, Inc.*, 787 F.2d 59, 63-64 (2d Cir. 1986) (abstention inappropriate where state court

---

[18] Respondents have cited *Boccardo v. Safeway Stores, Inc.*, 134 Cal. App. 3d 1037, 1041-1043 (1982), to the California Supreme Court on this point.

defendant, not plaintiff, filed a federal court action which included exclusive jurisdiction claim).[19]

Basic principles of wise judicial administration enunciated in *Colorado River* are often promoted by staying claims which are within a federal court's exclusive jurisdiction. The circumstances here — (1) petitioners had filed their claims in federal court as a precautionary measure, (2) they promptly thereafter moved for a stay, (3) respondents agreed to a stay, (4) petitioners' earlier filed state court actions would resolve all issues between the parties and (5) those issues are of importance to the State of California — collectively dictated abstention by the court below. Yet both the District Court and the Court of Appeals summarily declared that federal courts are *without discretion* to grant a plaintiff's motion to stay its own action. Petitioners believe this was plain error but, more importantly for purposes of certiorari, the lower court's disclaimer of discretion presents an unsettled issue of substantial importance to the orderly and efficient administration of justice in our federal courts.

---

[19] *See also*, 17A Wright, Miller & Cooper, *Federal Practice and Procedure*: Jurisdiction 2d § 4241 (1988) (a question that cuts across all categories of abstention is whether it is *ever* proper to abstain in a case in which the federal courts have exclusive jurisdiction); M. Solimine, *Rethinking Exclusive Federal Jurisdiction*, 52 U. Pitt. L. Rev. 383, 425 (1991) (it is unclear whether *Colorado River* abstention applies when suit lies within the exclusive jurisdiction of the federal courts; abstention of such claims may be appropriate).

CONCLUSION

The writ of certiorari should issue.

Respectfully submitted,

EUGENE CREW
(Counsel of Record)
DANIEL J. FURNISS
PAUL F. KIRSCH
THEODORE T. HERHOLD
TOWNSEND AND TOWNSEND
KHOURIE AND CREW
One Market Plaza
Steuart Tower, 20th Floor
San Francisco, CA 94105
Telephone: (415) 543-9600

Counsel for Petitioners
Legal Economic Evaluations, Inc.,
IBAR Settlement Company and
Weil Insurance Agency, Inc.

February 1, 1995

APPENDIX

APPENDIX

TABLE OF CONTENTS

		Page
A.	Opinion of the United States Court of Appeal for the Ninth Circuit, dated November 2, 1994	A-1
B.	Opinion of the United States District Court for the Northern District of California, dated November 20, 1992, and as amended upon stipulation, January 26, 1993	A-12
C.	Order of the United States District Court for the Northern District of California, dated April 22, 1992	A-20
D.	Order of the United States District Court for the Northern District of California, dated January 26, 1993	A-25
E.	Order of the United States Court of Appeal for the Ninth Circuit, dated December 15, 1994	A-32
F.	Opinion of the California Court for Appeal for the First District, Division Two, dated July 29, 1994	A-34
G.	Order of the California Supreme Court, dated October 13, 1994	A-61

APPENDIX A

Nos. 93-16007, 93-16028 and 93-16047.

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.

Argued and Submitted Oct. 6, 1994.
Decided Nov. 2, 1994.

LEGAL ECONOMIC EVALUATIONS, INC.,
a California Corporation,
Plaintiff-Appellant,

v.

METROPOLITAN LIFE INSURANCE COMPANY, ET AL.,
Defendants-Appellees.

IBAR SETTLEMENT CO.,
Plaintiffs-Appellant,

v.

METROPOLITAN LIFE INSURANCE COMPANY;
Transamerica Occidental Life; Manufacturers Life;
ML Settlement Services, Inc.; National Structured
Settlements Trade,
Defendants-Appellees.

WEIL INSURANCE AGENCY, INC.,
a California Corporation
dba JERRY C. WEIL & ASSOCIATES,
Plaintiff-Appellant,

v.

MANUFACTURERS LIFE, ET AL.,
Defendants-Appellees.

Appeals from the United States District Court for the Northern District of California.

Before: SCHROEDER, FERGUSON and RYMER, Circuit Judges.

RYMER, Circuit Judge:

These appeals require us to decide whether consultants who advise tort plaintiffs on structured settlements have suffered antitrust injury when they can't get information about premiums and rating practices from, or serve as brokers to arrange annuities to fund structured settlements with, life insurance carriers because of an alleged boycott by life insurance carriers and brokers who specialize in arranging annuities in behalf of tort defendants.

A structured settlement takes place when a tort defendant or its liability carrier purchases an annuity, with the tort plaintiff as the beneficiary, to settle a civil lawsuit. Legal Economic Evaluations, Inc., IBAR Settlement Co., and Weil Insurance Agency, Inc. (collectively Weil) are structured settlement consultants to tort plaintiffs. They have sued a number of life insurance carriers[1] and brokers[2] (Life Carriers and Brokers) under § 4 of the Clayton Act, 15

---

[1]The named life insurance carriers are: The Manufacturers Life Insurance Company, Alexander Hamilton Life Insurance Company of America, Metropolitan Life Insurance Company, New York Life Insurance Company, Transamerica Occidental Life Insurance Company, First Colony Life Insurance Company, Safeco Life Insurance Company, United Pacific Life Insurance Company, Allstate Life Insurance Company, American International Life Assurance Company of New York, The Prudential Life Insurance Company, and Integrity Life Insurance Company.

[2]The named brokers were: Ringler Insurance Agency (together with a number or Ringler-associated agencies), Kenneth H. Wells & Associates, Inc., ML Settlement Services, Inc., The Structured Settlements Company, and Galaher Settlements and Insurance Services Co., Inc.

The complaint also names as a defendant the National Structured Settlements Trade Association (NSSTA), a private trade association whose members included all the life carriers and brokers named in the complaint.

U.S.C. § 15, alleging that the Life Carriers and Brokers conspired to drive consultants and brokers for tort plaintiffs out of the annuity brokering business, thereby ensuring that only brokers for tort defendants would place annuities to fund structured settlements.

The district court granted summary judgment for Life Carriers and Brokers on the footing that if their policy harmed anyone, it was tort plaintiffs, and that the only possible injury was depriving tort plaintiffs of a stronger negotiating position in settlement negotiations. *Weil Ins. Agency, Inc. v. Manufacturers Life Ins. Co.*, 815 F.Supp. 1320 (N.D. Cal. 1992). Meanwhile, the court had declined to stay this action, at Weil's request, in deference to a state court action Weil had previously filed asserting a violation of the Cartwright Act., Cal. Bus. & Prof.Code §§ 16720 and 16721.5, California's antitrust statute. Weil appeals both rulings.

We have jurisdiction, 28 U.S.C. § 1291, and we hold that Weil's motion to stay was properly denied as federal jurisdiction over the Clayton Act claim is exclusive and the district court lacked discretion to abstain. With respect to its antitrust claim, Weil's injury from being unable to obtain information about tort defendants' annuity calculations, or to place annuities while consulting for tort plaintiffs, does not flow from the harm to competition it alleges: decreased annuity benefits to tort plaintiffs, and increased annuity costs to liability carriers. Nor has Weil suffered antitrust injury on account of being denied the business opportunity of working both sides of the street; the antitrust laws are concerned about injury to competition, not competitors. Because Weil has not shown antitrust injury, we affirm.

ML Settlement Services and Kenneth H. Wells & Associates have settled with Weil and are not parties to this appeal.

I

For purposes of the summary judgment, the facts are not in dispute. During the late 1970s and early 1980s, parties to tort actions turned with increasing frequency to the structured settlement as a means of resolving their disputes. Rather than pay a lump-sum cash settlement, a tort defendant or its casualty insurer will purchase an annuity, with the tort plaintiff named as the beneficiary. A structured settlement has something to offer each party. For the defendant (or its liability carrier), the annuity may be cheaper than paying the plaintiff the present value of the stream of future payments. The tort plaintiff, in turn, receives the guarantee of predictable future payments. The plaintiff also obtains a tax advantage: The future payments are not taxable income, whereas the future income a plaintiff would receive from investing a lump-sum payment would be taxed. *See* I.R.C. § 104(a)(2); Rev.Ruls. 79-200, 79-313.

The premium for an annuity is determined by applying the issuer's premium rate to the annuitant's age. The issuer may also apply a "rate-up" in quoting an annuity; this occurs when the issuer determines that the annuitant's chronological age does not reflect (in the issuer's judgment) the number of years that payments may be made, and the annuitant is given a "rated age" that corresponds to the issuer's estimation of her or his future longevity. Only a licensed broker is authorized to quote the cost of a given annuity.

Weil Insurance, Legal Economics and IBAR either lost business, or went out of business, as a result of the market differentiation that Weil attributed to a conspiracy by Life Carriers and Brokers to reduce the cost of structured settlements below the case value of tort claims. In furtherance of this conspiracy, Life Carriers and Brokers blocked tort plaintiffs and their attorneys from gaining access to annuity

price information, and boycotted companies, such as Weil, who were consulting with tort plaintiffs.

The complaint[3] alleges "two relevant product markets: (a) annuities sold to fund structured settlements of personal injury claims and (b) professional consulting services provided to (i) the injury victim and his/her attorney or (ii) the liability carrier regarding the use of annuities to fund structured settlements of personal injury claims." It then alleges that competition was injured in that the conspiracy among Life Carriers and Brokers depressed the consideration liability carriers paid to settle claims below the cash value of those claims; reduced the sale of annuities by withholding annuity information from tort plaintiffs, their counsel, and those who acted as their brokers, consultants, and agents; and produced a boycott of consultants and agents (such as Weil) who provided services to tort plaintiffs.

II

Weil argues that it has shown antitrust injury because Life Carriers and Brokers acted with the purpose and effect of denying access to competition in the structured settlement brokerage and consulting market as well as access to the relationships with life insurers necessary to compete in those markets. In addition, Weil contends, the boycott suppressed information critical to the proper competitive working of the structured settlement market place; distorted the price paid by property and casualty companies for structured settlement annuities; and reduced the number of structured settlement annuities that were consummated.

Antitrust injury is "injury of the type the antitrust laws were intended to prevent and that flows from that which

---

[3]Our reference to "the complaint" encompasses the allegations common to all three pleadings.

makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977). Weil first argues that it satisfies this standard as the injury it has suffered — elimination as a market competitor — is the type of harm that antitrust scrutiny of group boycotts is designed to prevent. This, however, does not suffice. Exclusion of a competitor may be a necessary condition to finding that a group boycott or refusal to deal violates the antitrust laws, but it is not a sufficient condition for finding antitrust injury. Otherwise, antitrust injury would be presumed whenever the challenged practice is per se illegal and, as Weil concedes, it is not. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 341-45, 110 S.Ct. 1884, 1893-95, 109 L.Ed.2d 333 (1990). The antitrust laws were enacted the "the protection of *competition,* not *competitors.*" *Brown Shoe Co. v. United States,* 370 U.S. 294, 320, 82 S.Ct. 1502, 1521, 8 L.Ed.2d 510 (1962); *see also United States v. Syufy Enters.,* 903 F.2d 659, 668 (9th Cir. 1990) (same). Therefore, the private plaintiff must link its own injury to the *anticompetitive* aspect of the defendants' conduct. *ARCO,* 495 U.S. at 339, 110 S.Ct. at 1891-92.

Weil argues that it has done so, since its injuries are the same as the Court identified in *Northwest Wholesale Stationers, Inc., v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 105 S.Ct. 2613, 86 L.Ed.2d 202 (1985), as the two major anticompetitive problems that group boycotts may produce: they may "disadvantage competitors by either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle[,]" and, related to this concern, a group boycott may "cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete." *Id.* at 294, 105 S.Ct. at 2619 (quotation marks omitted). *Northwest Stationers,* however, does not say that these factors represent the harm to competition from which anti-

trust injury must flow; rather, it identifies them as characteristics common to past group boycott cases in which a per se rule had been applied. Indeed, the Court held that concerted activity need not necessarily result in anti-competitive effects. *Id.* at 295-96, 105 S.Ct. at 2620-21.

The difficulty with Weil's case is that its injury does not match either the mischief about which it complains or the markets in which it occurred. Weil argues that the defense-only policy has produced a market for brokering and consulting services in which there is no competition "at the point of sale." This comes about because Weil believes there is little incentive on the defense-only broker's part to achieve a more favorable rate for the liability carrier by shopping among Life Carriers who charge different rates for comparable annuities, or to obtain a more favorable payout for the tort plaintiff. Assuming this to be true, the alleged harm to competition — decreased annuity benefits to tort plaintiffs and increased annuity costs to liability carriers — nevertheless occurs in markets in which Weil does not compete. Weil is neither a liability carrier nor a tort plaintiff. Thus, even if price fixing of structured settlements injures tort plaintiffs, and restriction on output increases the cost of annuities and thereby injures Life Carriers, Weil's injury does not flow from these competitive harms.

In reality, of course, tort plaintiffs, whom Weil represents, are litigation competitors of liability carriers. If liability carriers, who purchase annuities, are not getting their money's worth, that is not an injury of concern to the antitrust laws. There is no evidence that liability carriers are stuck with a limited number of brokers, or are unable to comparison-shop; if they chose not to do so or chose to buy a higher-priced product for whatever the reason, it is not for Weil, or the anti-trust laws, to protect them from themselves. Likewise, even if tort plaintiffs as a class are worse off because a plaintiff's broker might be able to find a better

deal, their harm flows from what makes a structured settlement economically attractive, not from anticompetitive conduct. Tort plaintiffs do not purchase annuities to fund structured settlements because they would lose the tax advantages that are available only when the annuities are bought by defendants. *Cf. Yellow Pages Cost Consultants v. GTE Directories Corporation,* 951 F.2d 1158 (9th Cir. 1991) (client placed business with consultant's help with GTE), *cert. denied,*_____ U.S. _____, 112 S.Ct. 1947, 118 L.Ed.2d 552 (1992). In any event, to the extent that tort plaintiffs are harmed, that harm arises in the market for settling litigation.

Weil's argument that the defense-only policy eliminated an entire class of competitors (those who write annuities to fund structured settlements while representing tort plaintiffs) is similarly misplaced. Annuities are still being placed and brokers are still writing that business. Plaintiff-side brokers are not writing the business, but "[i]t is injury to the market or to competition in general, not merely injury to individuals or individual firms that is significant." *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 812, (9th Cir. 1988). By the same token, there is no diminution of competition among those who wish to represent tort plaintiffs on account of Life Carriers and Brokers' defense-only policy. None has access to more information about Life Carriers' rating practices than any other; conversely, all would be out of the consulting business if the same information were freely available to both tort defendants (who do the buying) and tort plaintiffs (who are the beneficiaries). In this sense the differentiated market has created a new breed of competitor, such that the choice of whether to consult for tort plaintiffs or to broker for tort defendants lacks anticompetitive consequence.

Nothing in *Blue shield of Virginia v. McCready,* 457 U.S. 465, 102 S.Ct. 2540, 73 L.Ed.2d 149 (1982), upon which

Weil relies, suggests otherwise. The plaintiff in that case, a member of defendant's health plan, brought an antitrust suit against the plan on account of its policy of reimbursing psychiatrists, but not clinical psychologists, for psychotherapy services. The plaintiff alleged an unlawful conspiracy between the plan and the psychiatrists' association to boycott psychologists. The Court held that the plaintiff satisfied the antitrust injury requirement, since her injury was "inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market." *Id.* at 484, 102 S.Ct. at 2551. Weil asserts that it is in the same position as the plaintiff in *McCready:* Like the *McCready* plaintiff who faced "Hobson's choice" of either settling for a doctor she did not wish to see or visiting the psychotherapy specialist of her choice (and forgoing reimbursement) *id.* at 483, 102 S.Ct. at 2550, Weil either had to join the conspiracy and give up work for the clients of its choice or had to resist the conspiracy and give up profits from performing work for tort plaintiffs. *McCready* is, however, different. Because the *McCready* plaintiff was a *consumer* in the market for psychotherapy services, the ultimate harm from the conspiracy would be borne by her either directly (by having to pay more for those services) or indirectly (by having fewer options). In either event, the harm would have been borne in the *same* market (for psychotherapy services). Weil, by contrast, stands to suffer harm in the market for brokerage or consulting services — either by limiting its choice of clients or receiving less in fees; but the asserted harm to competition takes place in different markets, for settling lawsuits or selling annuities.

Because we conclude that Weil has failed to show that it losses flow from injury to competition in the relevant market, we do not reach Life Carrier and Brokers' alternative theories having to do with aspects of the legal process which they offer in support of the district court's judgment.

III

Weil contends that the district court erred in refusing to stay the federal proceedings pending the outcome of its state court proceedings pursuant to *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). The district court followed binding Ninth Circuit precedent which precludes *Colorado River* abstention where federal jurisdiction is exclusive. *See Minucci v. Agrama,* 868 F.2d 1113, 1115, (9th Cir. 1989) (Copyright Act); *Turf Paradise, Inc. v. Arizona Downs,* 670 F.2d 813, 821 (9th Cir.) (Sherman Act), *cert. denied,* 456 U.S. 1011, 102 S.Ct. 2308, 73 L.Ed.2d 1308 (1982). The court correctly found inapplicable the case Weil relies on, *Attwood v. Mendocino Coast Dist. Hosp.,* 886 F.2d 241 (9th Cir. 1989), because federal and state courts enjoy concurrent jurisdiction over the statute in issue there, 42 U.S.C. Section 1983.

Weil argues that its case is distinguishable from *Minucci* and *Turf Paradise* because the application for a stay in this case was made by the federal *plaintiff* in an effort to preserve its rights to litigate in its forum of second choice. Weil points out that the Court in *Colorado River* supported its statement concerning "the virtually unflagging obligation of the federal court to exercise the jurisdiction given them," 424 U.S. at 817, 96 S.Ct. at 1246, with a citation to *England v. Louisiana State Board of Medical Examinators,* 375 U.S. 411, 415, 84 S.Ct. 461, 464-65, 11 L.Ed.2d 440 (1964). The Court in *England,* in turn, stated that "[t]he right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied." *Id.* (quotation marks omitted). Because the Court in *England* was concerned that a *plaintiff* should not ordinarily be deprived of her or his choice to litigate a federal claim in federal court, Weil argues that the *Colorado River* language about the federal courts' obligation

to hear federal claims is inapplicable where a plaintiff seeks a stay of the federal proceedings.

This argument fails. While it is true that *England* was concerned with protecting a plaintiff's right to litigate in federal court, nothing in that case of in *Colorado River* suggests that a plaintiff may hedge its bets by filing a federal claim in federal court, placing that claim on hold, and taking a shot with an analogous cause of action in state court.

AFFIRMED.

APPENDIX B

No. C 91-3113 SC.

UNITED STATES DISTRICT COURT,
N.D. California.

November 20, 1992.

As Amended Upon Stipulation,
Jan. 26, 1993.

WEIL INSURANCE AGENCY, INC.
a California corporation, doing business
as JERRY C. WEIL & ASSOCIATES

v.

THE MANUFACTURERS LIFE INSURANCE COMPANY,
et al.

ORDER RE SUMMARY JUDGMENT

CONTI, Senior District Judge.

I. INTRODUCTION

Plaintiff Weil Insurance Agency, Inc. ("Weil") was in the business of providing consulting services to tort plaintiffs on the costs of structured settlements. Defendants in this case are mainly brokers and life insurance companies who are involved in the structured settlement industry. Weil alleges that it was driven out of the industry by defendants' "defense only" policy of refusing to provide information on the costs of structured settlements to brokers who did business with tort plaintiffs.

Weil brought claims under section 4 of the Clayton Act, 15 U.S.C. § 15, for violations of section 1 and section 2 of the Sherman Anti-Trust Act, 15 U.S.C. §§ 1, 2. Weil also brought claims under the California antitrust statute, as well as an assortment of state law tort and breach of contract

claims. Several of the defendants now join in moving for summary judgment on Weil's federal antitrust claims.

II. STATEMENT OF FACTS

A. The Structured Settlement Industry

For the parties in tort suits, structured settlements offer several advantages over lump sum payments. First, the plaintiff is guaranteed a steady stream of income over a long period of time. Second, the money received by the plaintiff under a structured settlement is often tax-free. Third, the amount received by the plaintiff in a structured settlement is usually more than what the plaintiff would receive in a lump sum payment, and it can be provided at a lower cost to the defendant. Thus, the availability of structured settlements often encourages the settlement of tort suits.

Tort defendants finance structured settlements by purchasing annuities from life insurance companies, either directly or through the tort defendant's liability insurer. The sale is usually arranged by a structured settlement broker, who acts as a consultant to the tort defendant, defense counsel, and the defendant's liability insurer.

Weil alleges that certain life insurance providers have a practice of marketing their annuities through brokers that represent tort defendants exclusively. According to Weil, these brokers do not disclose the price of the annuity — that is, the cost of the structured settlement to the tort defendant — to the tort plaintiff or its representatives. Weil claims that the "defense only" policy is the result of an anticompetitive conspiracy between the life insurance companies, certain structured settlement brokers, and the National Structured Settlement Trade Association, all of whom are named as defendants in this action.

B. Weil's Entry Into, and Exit From, the Structured Settlement Industry

Weil began marketing structured settlements as a broker in 1985. In January 1986, Weil entered in an agency agreement (the "Richardson Contract") with A.J. Richardson & Associates ("Richardson"[1]), a specialized structured settlement broker. Under the Richardson Contract, Weil received quotes on annuities from the defendant life insurance companies, and placed structured settlements with tort defendants as an agent of Richardson. Weil did not deal directly with the defendant life insurance companies.

Richardson notified Weil on several occasions that Richardson required Weil to quote the life insurance companies' annuity prices only to tort defendants or their liability insurers. However, Weil began providing specific quotations on annuity prices to tort plaintiffs as part of a consulting service Weil offered to the tort plaintiffs' bar. This enabled the tort plaintiffs to secure more favorable structured settlements. Not surprisingly, the demand for Weil's services increased substantially.

On August 4, 1989, Richardson terminated the Richardson Agreement, after complaints from certain defendant brokers and defendant life insurance companies. Shortly after its termination by Richardson, Weil was forced to discontinue its structured settlement business. Weil alleges that it was forced out of the business as a result of the defendants' defense only policy.

III. SUMMARY JUDGMENT STANDARD

Summary judgment is proper only when there is no genuine issue of material fact or when, viewing the evidence in the light most favorable to the non-moving party, the

---

[1]Richardson is not a party to this action.

movant is clearly entitled to prevail as a matter of law. Fed.R.Civ.P. 56(c); *Bhan v. NME Hospitals, Inc.*, 929 F.2d 1404, 1409 (9th Cir.1991), *cert. denied* ____ U.S. ____, 112 S.Ct. 617, L.Ed.2d 639 (1991). The party moving for summary judgment has the burden of proving the absence of any genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 2514, 91 L.Ed.2d 202 (1986).

Once the moving party demonstrates the absence of any genuine issue of material fact, however, the burden shifts to the nonmoving party to produce evidence sufficient to support a jury verdict in his favor. *Id.* at 255, 106 S.Ct. at 2513. To meet this burden, the nonmoving party must go beyond the pleadings and show "by her own affidavits, or by the depositions, answers to interrogatories, or admissions on file" that a genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

IV. DISCUSSION

Section 4 of the Clayton Act allows any person "injured in his business or property by reason of anything forbidden in the antitrust laws" to sue for treble damages. 15 U.S.C. § 15. This section imposes a standing requirement on private parties who seek to enforce the antitrust laws. Even if the defendants violate antitrust laws, "the right of action under § 4 of the Clayton Act is available only to those private plaintiffs who have suffered *antitrust* injury." *ARCO v. U.S.A. Petroleum Co.*, 495 U.S. 328, 344, 110 S.Ct. 1884, 1893, 109 L.Ed.2d 333 (1990) (emphasis added).

The Supreme Court has held consistently that antitrust injury is not to be equated with injury in fact. *Id.* at 339 n. 8, 110 S.Ct. at 1892 n. 8; *see also Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977). "Antitrust injury does not arise for purposes of

the Clayton Act until a private party is adversely affected by an *anticompetitive* aspect of the defendant's conduct." *ARCO*, 495 U.S. at 339, 110 S.Ct. at 1891 (citations omitted) (emphasis in original). Thus, the dispositive issue on this motion is whether Weil has any evidence that it has been injured in an anticompetitive manner by defendants' alleged conduct.

If the structured settlement industry's policy results in injury to anyone, it is to tort plaintiffs. If a tort plaintiff had access to the price of an annuity to the tort defendant, then the tort plaintiff could better estimate the top amount the defendant would pay to settle the case. This would give tort plaintiffs a stronger negotiating position in settlement negotiations, which would allow them to bargain for larger settlements. Thus, according to Weil, tort plaintiffs are injured by the industry's policy.

Assuming, without deciding, that being deprived of this negotiating advantage is an injury to tort plaintiffs, this is not the type of injury that the antitrust laws were designed to prevent. The cost of the annuities to the tort defendant is almost always privileged work product information.[2] If tort plaintiffs were allowed to find out such information by hiring a consultant such as Weil, they would be able to obtain privileged information without the consent of the defense. Since tort plaintiffs have no right to this information, they have not suffered any legally cognizable harm from having it withheld from them.

Furthermore, tort plaintiffs and tort defendants are parties to an explicitly adversarial relationship. The purpose of the

---

[2]The price quotations given by the life insurance providers to the tort defendants are based on the defendants' evaluation of the tort plaintiff's expected life span, which is often based on the defendants' confidential evaluation of the plaintiff's injuries. This is clearly protected work product.

antitrust laws is "the prevention of restraints to free competition in business and commercial transactions." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493, 60 S.Ct. 982, 992, 84 L.Ed. 1311 (1940). The antitrust laws are not intended to regulate negotiations between adversaries in litigation.

Most importantly to the issue in this motion, Weil itself is not a tort plaintiff. Weil therefore cannot recover under the Clayton Act by showing that tort plaintiffs somehow are injured by defendants' conduct. Weil must show that it suffered some antitrust injury to *itself*.

Weil has submitted no evidence which shows that it is injured in an anticompetitive manner from defendants' conduct. Weil's relevant competition, in this market, would be other structured settlement consultants who provided services to tort plaintiffs. Nothing about the alleged conspiracy in this case prevented Weil from continuing to act as a consultant to tort plaintiffs without disclosing the confidential information on annuity prices. Weil has admitted through discovery that this is a highly competitive market. Weil has offered no evidence to suggest that the defense only policy alleged by Weil has any effect on Weil's ability to compete in this market. On the contrary, the industry's defense only policy merely deprived Weil of an unfair advantage it gained over its competition. Thus, Weil has not suffered any antitrust injury.

Weil argues, however, that it does not need to show any antitrust injury to itself because of the nature of Defendants' alleged conduct. Certain restraints of trade have been held to be *per se* violations of the Sherman Act. Weil contends that defendants' conduct in this case amounts to an industry-wide boycott of a competitor, which according to Weil is a *per se* violation of the Sherman Act. Weil claims that it is not necessary to prove actual antitrust injury where the plaintiff can prove a *per se* violation by defendants. Thus,

Weil argues, it can survive this motion for summary judgment without any showing of antitrust injury to itself.

Weil's contentions in this regard are unfounded. It is true that liability under the Sherman Act can be established by a showing of a *per se* violation, without any proof of actual antitrust injury to a private party. But the fact that a *per se* violation of the Sherman Act is involved is not dispositive of the issue of whether a private party has a right of action under the Clayton Act to seek treble damages for the alleged violation. The Supreme Court clearly has held that "even in cases involving *per se* violations, the right of action under § 4 of the Clayton Act is available only to those private plaintiffs who have suffered antitrust injury."[3] *ARCO*, 495 U.S. at 344, 110 S.Ct. at 1893.

Thus, this court need not determine whether the alleged conduct of Defendants is a *per se* violation of the Sherman Act. The dispositive issue on this motion is whether Weil itself has suffered any antitrust injury. For the reasons given above, there is no genuine issue of fact whether Weil has suffered antitrust injury. Defendants' motion for summary

---

[3]Weil tries to distinguish *ARCO* on the grounds that the *ARCO* case involved vertical price fixing, while this action alleges a horizontal agreement among the Defendants. However, the Supreme Court's holding in *ARCO* is clearly broad enough to encompass all forms of *per se* violations of the Sherman Act. As the court noted in *ARCO*, "in a case involving horizontal price fixing, 'perhaps the paradigm of an unreasonable restraint of trade,' we observed that the plaintiffs were still required to 'show that the conspiracy caused *them* an injury for which the antitrust laws provide relief.' " 495 U.S. at 344, 110 S.Ct. at 1893-1894 (citing *Matsushita Elec. Ind. Corp. v. Zenith Radio Corp.*, 475 U.S. 574, 584 n. 7, 106 S.Ct. 1348, 1354 n. 7, 89 L.Ed.2d 538 (1986)) (emphasis in original). Given this language, Weil's attempt to distinguish *ARCO* on its facts is misguided at best.

judgment on Weil's federal antitrust claims therefore is granted.[4]

V. CONCLUSION

In accordance with the foregoing, the court hereby enters summary judgment on plaintiff's claims under section 1 and section 2 of the Sherman Anti-Trust Act, 15 U.S.C. §§ 1, 2, as to the following defendants:

The Manufacturers Life Insurance Company;
Alexander Hamilton Life Insurance Co. of America;
First Colony Life Insurance Co.;
Galaher Settlements and Insurance Service Co., Inc.;
Kenneth H. Wells & Associates, Inc.;
Metropolitan Life Insurance Company;
ML Settlement Services, Inc.;
National Structured Settlements Trade Association;
The Prudential Insurance Company of America;
Ringler Insurance Agency; Ringler Associates Pacific, Inc.; Ringler Associates Sacramento, Inc.; Ringler Associates San Francisco, Inc.; Ringler Associates Bay Area, Inc.; Ringler Associates Inc. doing business as Ringler Associates Inc. of Delaware;
Robert S. Bell;
Safeco Life Insurance Company;
The Structured Settlements Company;
Transamerica Occidental Life Insurance Company.

IT IS SO ORDERED.

---

[4]The parties have not briefed the court on whether the above issues are dispositive of Weil's claims under the California antitrust statute, so this court's Order does not address those claims.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FILED
April 22, 1992
Richard W. Wieking
Clerk, U.S. District Court
Northern District of California

WEIL INSURANCE AGENCY, INC., a California corporation, doing business as JERRY C. WEIL & ASSOCIATES,
Plaintiff,

v.

THE MANUFACTURERS LIFE INSURANCE COMPANY, et al.,
Defendants.

LEGAL ECONOMIC EVALUATIONS, INC.,
Plaintiffs,

v.

METROPOLITAN LIFE INSURANCE COMPANY, et al.,
Defendants.

IBAR SETTLEMENT COMPANY, INC.
Plaintiffs,

v.

METROPOLITAN LIFE INSURANCE COMPANY, et al.,
Defendants.

Nos. C 91-3113 SC
C 91-3111 SC
C 91-3112 SC

ORDER RE EX PARTE APPLICATION FOR STAY OR 56(f) CONTINUANCE

I. Introduction

Plaintiff, Weil Insurance Agency ("Weil"), brought this ex parte application for stay of proceedings in this court pending the outcome of state court proceedings. In the alternative, Weil asks for a continuance, pursuant to Fed.R.Civ.P. 56(f) of defendants' summary judgment motions, now set for hearing before this court on May 8, 1992. Weil has noticed a motion for a stay and the hearing on that motion is also scheduled for May 8. For whatever reason, however, Weil still felt compelled to employ ex parte proceedings in advance of the regularly scheduled motion.

Local Rule 220-10(f), governing ex parte applications for an order shortening time, provides:

> Applications for orders shortening the time permitted or required for the filing of any paper or pleading or the doing of any act under the Federal Rules of Civil Procedure shall be supported by a certificate stating the reasons therefor. When the application is made ex parte, the certificate shall state the reason why a stipulation could not be obtained or notice could not be given.

Weil has utterly failed to comply with this rule. Ex parte proceedings are frowned upon by this court, and should only be employed, as the rules state, when absolutely necessary and when a noticed motion is completely unsatisfactory under the circumstances. In this case, moreover, the issue has been fully briefed on both sides after defendants were notified regarding the ex parte application.

Weil has not provided a single reason why its currently noticed motion for stay is insufficient to dispose of the issue. Moreover, a request for a continuance pursuant to 56(f) is properly made in a party's opposition to the motion, *not* in an ex parte proceeding prior to the date for opposition. The court is at pains not to countenance or reward such flagrant

abuse of the ex parte process and would deny Weil's application on those grounds alone. However, in an effort to promote judicial efficiency, since both parties have now fully briefed the stay issues, the court will take this opportunity to deny Weil's application for a stay on the merits as well.

II. Background

On June 6, 1990, plaintiff filed suit in San Francisco Superior Court alleging a variety of state-law causes of action, including anti-trust claims under the Cartwright Act, the California anti-trust statute. Demurrers were sustained as to certain portions of the complaint, including the anti-trust claims on the grounds that they are preempted by state insurance law, and cross-writs were taken from the rulings. The writ proceedings are still pending.

On September 16, 1991, Weil filed the instant action against certain life insurance companies, brokers, and a trade association alleging violations of the Sherman Act and a host of pendent state claims, including the very claims which are the subject of the pending state court suit. Weil contends it filed suit only to protect its federal claims, which were soon to be time-barred, in the event its causes of action were thrown out of state court. Weil now requests a stay of the proceedings in this court, claiming it would rather litigate in state court.

III. Request for Stay

Weil rests the bulk of its argument for a stay on *Attwood v. Mendocino Coast Dist. Hospital,* 886 F.2d 241 (9th Cir. 1989), which held that a federal court should stay, rather than dismiss, federal proceedings where the federal case was filed simply to stop the statute of limitations from running and there is a likelihood that all issues will be fully resolved in the state court proceedings. *Attwood* in turn relies on

Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976), which held that considerations of wise judicial administration, conservation of judicial resources, and comprehensive disposition of litigation, may dictate that a federal court await the outcome of duplicative state court proceedings.

As defendants' point out, however, and as Weil utterly fails to recognize, both *Attwood* and *Colorado River* itself are premised on the existence of *concurrent* state and federal jurisdiction. *Minucci v. Agrama,* 868 F.2d 1113, 1115 (9th Cir. 1989) ("the *Colorado River* doctrine only applies to claims under the concurrent jurisdiction of the federal and state courts). In the present case, Weil was forced to allege Sherman Act violations to invoke federal jurisdiction. But the federal jurisdiction invoked is *exclusive* federal jurisdiction over the Sherman Act claims. *Turf Paradise, Inc. v. Arizona Downs,* 670 F.2d 813, 821 (9th Cir. 1982). Where jurisdiction is exclusive, not only do the policy considerations detailed in *Colorado River* not apply, but a district court abuses its discretion by invoking the *Colorado River* doctrine.

Weil's reliance on *Attwood* is therefore as misplaced as its reliance on ex parte process to bring *Attwood* to this court's attention. Accordingly, Weil's request for a stay is hereby DENIED and Weil is further ORDERED to withdraw its motion for a stay from the May 8, 1992, calendar or face sanctions.

IV. Request for a Continuance

Fed.R.Civ.P. 56(f), governing continuanoes of a summary judgment motion for further discovery, provides:

> Should it appear from the affidavits of a party *opposing the motion* that the party cannot for reasons stated present by affidavit facts essential to justify the party's

> opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just. (emphasis supplied)

Weil's request for a continuance of the summary judgment motion is premature and should be included as part of the opposition to that motion. The use of ex parte proceedings rather than a noticed motion in this instance is wholly inappropriate and constitutes an inexcusable abuse of ex parte proceedings. Accordingly, Weil is hereby ordered to raise its arguments in opposition to the scheduled motion, which opposition is to be filed with this court no later than 5:00 p.m. on April 24, 1992.

V. Conclusion

In accordance with the foregoing, the court hereby orders that:

(1) Weil's ex parte application for a stay is DENIED, and Weil is ORDERED to withdraw its motion for a stay from the May 8, 1992, calendar or face sanctions;

(2) Weil's ex parte application for a continuance of certain defendants' summary judgment motion is hereby DENIED on the grounds that such arguments should properly be presented to the court in Weil's opposition to the summary judgment motion, which must be filed no later than 5:00 p.m. on April 24, 1992.

IT IS SO ORDERED.

Dated: April 22, 1992.

/s/ SAMUEL CONTI
United States District Judge

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WEIL INSURANCE AGENCY, INC.,
a California corporation doing business as
JERRY C. WEIL & ASSOCIATES,
Plaintiff,

v.

THE MANUFACTURERS LIFE INSURANCE COMPANY, et al.,
Defendants.

LEGAL ECONOMIC EVALUATIONS, INC.,
Plaintiffs,

v.

METROPOLITAN LIFE INSURANCE COMPANY, et al.,
Defendants.

IBAR SETTLEMENT COMPANY, INC.
Plaintiffs,

v.

METROPOLITAN LIFE INSURANCE COMPANY, et al.,
Defendants.

FILED
January 16, 1993
Richard W. Wieking
Clerk, U.S. District Court
Northern District of California

Nos. C 91-3113 SC
C 91-3111 SC
C 91-3112 SC

ORDER RE DISMISSAL

I. INTRODUCTION

This case presents the issue of whether the court should exercise its supplemental jurisdiction over state law claims when it has already dismissed all federal claims and there are pending state court proceedings on the identical state law claims.

II. FACTS

Plaintiff Weil Insurance Agency, Inc. ("Weil") was in the business of providing consulting services to tort plaintiffs on the costs of structured settlements. Defendants in this case are mainly brokers and life insurance companies who are involved in the structured settlement industry. Weil alleges that it was driven out of the industry by defendants' "defense only" policy of refusing to provide information on the costs of structured settlements to brokers who did business with tort plaintiffs.

Weil brought claims in this court under section 1 and section 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2. Weil also brought claims under the California antitrust statute, known as the Cartwright Act. In addition, Weil joined numerous other state law claims, including a claim of unfair discrimination under the Unruh Act, claims under the California Unfair Competition Act, a claim under the California Insurance Code, and common law tort claims for negligent and intentional interference with contractual relations.

Other plaintiffs brought similar claims against the defendants in the *Legal Economic Evaluations, Inc.* case ("*LEE*") and the *IBAR Settlement Company, Inc.* case ("*IBAR*"). These cases have been related to the *Weil* case.

Prior to the filing of these actions in federal court, the plaintiffs in these actions had filed identical actions on the state law claims in various California courts. In the Weil

case, the California Superior Court sustained a demurrer to plaintiffs' Cartwright Act claims on the ground that the California Insurance Code preempts Cartwright Act claims against insurance companies. This ruling is currently before the California Court of Appeals. Defendants concede, in papers filed with the California Court of Appeals, that this issue has potential public policy import beyond the case at bar. The California Attorney General has filed an *amicus* brief on behalf of the California Insurance Commissioner. Also, a retired California Supreme Court Justice has filed an *amicus* brief on behalf of the California Chamber of Commerce and the Association of California Life Insurance Companies.

On November 20, 1992, this court entered an Order in the *Weil* action granting summary judgment in favor of certain defendants on Weil's federal claims (the "November 20 Order"). The parties in the *IBAR* and *LEE* actions have stipulated to the entry of summary judgment for defendants on the federal claims in those actions, based on the findings of fact and conclusions of law in the November 20 Order.

These cases are currently before the court on the motion of the plaintiffs in all three related actions to dismiss their remaining state law claims, and the defendants' motion for summary judgment on these same claims.

III. DISCUSSION

The parties understandably disagree on the order in which this court should decide their motions. The plaintiffs want the court to first decide their motion to dismiss, which, if granted, would obviate the need for the court to address the defendants' motion for summary judgment. Defendants wish the court to first decide their motion for summary judgment. Both sides want the state law claims in these actions to be dismissed. The only issue is whether the court should dismiss them with or without prejudice.

For the reasons set forth below, the court believes that the parallel state court proceedings warrant the dismissal of these claims without prejudice, so that important issues of state law can be decided by the state court in the first instance.

Jurisdiction over the state law claims in these actions is purely supplemental. These claims are only in federal court because they are related to the federal antitrust claims over which this court had exclusive jurisdiction. 28 U.S.C. § 1367(a). Section 1367(c) provides:

> The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if —
>
> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c).

In these related cases, there are many reasons why this court should decline to exercise its supplemental jurisdiction. First and foremost among these is the pendency of the state court proceedings. The defendants, in their motion for summary judgment, seek *inter alia* to have this court adjudicate the plaintiffs' Cartwright Act claims on the merits. The California Court of Appeals, though, is poised to issue a decision on whether such claims are preempted by the California Insurance Code, and thus cannot be maintained under California law. This is a novel question of state law,

which also has import beyond the parties involved and the case at bar. Principles of comity and federalism compel this court to decline its supplemental jurisdiction, deferring to the state court to decide this issue in the first instance.

Also, the court has dismissed all of the federal claims in each of these related actions.[1] There is no reason for the court to adjudicate the remaining state law claims when there are pending state proceedings in which the state courts can do so relatively promptly.

The defendants contend that the findings of fact and conclusions of law in this court's November 20 Order are dispositive of many of the plaintiffs' state law claims. In particular, the defendants argue that the November 20 Order is dispositive of the plaintiffs' Cartwright Act claims. This is certainly not apparent on the face of their summary judgment motion. In the November 20 Order, this court held that the plaintiffs did not have standing to bring a private suit under the federal antitrust laws. The California Supreme Court has not expressed a clear opinion on the issue of whether standing to bring a private suit is the same under the Cartwright Act as under the federal antitrust laws. If this court were to decide the defendants' summary judg-

---

[1]In the November 20 Order, the court granted summary judgment on the federal claims for all defendants in the *Weil* action except for New York Life Insurance Company and Transamerica Occidental Life Insurance Company. The parties thereafter entered into a stipulation, based on the November 20 Order, granting summary judgment in favor of all of the defendants in the *LEE* and *IBAR* actions.

At the time the instant motions were filed, the plaintiffs still had federal claims in the *Weil* action against New York Life and Transamerica Occidental. However, on January 26, 1992, the parties entered a Stipulation and Order dismissing the plaintiffs' claims against New York Life with prejudice. On that same day, the court entered an order, based on the stipulation of the parties, amending its November 20 Order to include Transamerica as a prevailing party. Thus, there are no longer any federal claims remaining in any of these related cases.

ment motion, it would have to issue a decision on this important question of California law. As mentioned above, to do so would be inappropriate where state court proceedings are pending in which the state court could decide this issue in the first instance.

As to the plaintiffs other state law claims, they involve issues which, at first glance, seem to be wholly unrelated to the issues adjudicated by the court in its November 20 Order. Given the pendency of the parallel state court proceedings, this court leaves these issues for the state courts to determine. If indeed the findings of fact in the November 20 Order are dispositive of these claims, the state court surely will give the appropriate effect to this court's findings.

The fact that the defendants' have moved for summary judgment on these claims does not affect this court's decision not to exercise its supplemental jurisdiction. The defendants will suffer no prejudice if the court does not decide their summary judgment motion. The exact same motion can be filed in the state court proceedings with no additional work on the part of the defendants, except for changing the name of the court in the caption. Defendants did not conduct any further discovery in filing this motion. They simply generated a motion contending that the findings of fact in the November 20 Order are dispositive of the state law claims. As noted above, principles of comity and federalism compel the court to defer to the state courts to make that decision.

In summary, there are myriad reasons why this court should decline to exercise its discretion to adjudicate the plaintiffs' state law claims. The court hereby dismisses these claims without prejudice. The court does not reach the merits of the defendants' motion for partial summary judgment.

IV. CONCLUSION

In accordance with the foregoing, the plaintiffs' motion to dismiss is GRANTED. The remaining state law claims in these related cases are dismissed without prejudice.

IT IS SO ORDERED.

Dated: January 26, 1993.

/s/ SAMUEL CONTI
United States District Judge

EXHIBIT E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LEGAL ECONOMIC EVALUATIONS, INC.,
a California Corporation,
Plaintiff - Appellant,

v.

METROPOLITAN LIFE INSURANCE COMPANY, et al.,
Defendants - Appellees.

IBAR SETTLEMENT CO.,
Plaintiff - Appellant,

v.

METROPOLITAN LIFE INSURANCE COMPANY;
TRANSAMERICA OCCIDENTAL LIFE; MANUFACTURERS
LIFE; ML SETTLEMENT SERVICES, INC.; NATIONAL
STRUCTURED SETTLEMENTS TRADE,
Defendants - Appellees.

WEIL INSURANCE AGENCY, INC., a California
Corporation dba JERRY C. WEIL & ASSOCIATES,
Plaintiff - Appellant,

v.

MANUFACTURERS LIFE, et al.,
Defendants - Appellees.

FILED
December 15, 1994
Cathy A. Catterson, Clerk
U.S. Court of Appeals

No. 93-16007
D.C. No. CV-91-3111-SC
No. 93-16028
D.C. No. CV-91-3112-SC
No. 93-16047
D.C. No. CV-91-3113-SC

ORDER

Before: SCHROEDER, FERGUSON and RYMER, Circuit Judges

The panel has voted to deny the petition for rehearing. Judges Schroeder and Rymer vote to reject the suggestion for rehearing en banc and Judge Ferguson so recommends.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for a rehearing en banc is REJECTED.

EXHIBIT F

[No. A052795. First Dist., Div. Two, July 29, 1994.]

MANUFACTURERS LIFE INSURANCE COMPANY ET AL.,
Petitioners,

v.

THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO,

Respondent;

WEIL INSURANCE AGENCY, INC.,
Real Party in Interest.

[No. A055038, First Dist., Div. Two, July 29, 1994.]

WEIL INSURANCE AGENCY, INC.,

Petitioner,

v.

THE SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO,

Respondent;

MANUFACTURERS LIFE INSURANCE COMPANY, ET AL.,
Real Parties in Interest.

OPINION

BENSON, J.* — Plaintiff Weil Insurance Agency, Inc. (Weil), brought this action for damages alleging primarily an unlawful boycott in the sale of annuities used to fund structured settlements of personal injury claims. Various

*Retired Associate Justice of the Court of Appeal, First District, sitting under assignment by the Chairperson of the Judicial Council.

defendants successfully demurred to the complaint, insofar as it asserted statutory causes of action, mainly on the ground that such causes of action were superseded by provisions of the Insurance Code. We have concluded that this contention is unsound and that plaintiff can state a cause of action under the Cartwright Act (Bus. & Prof. Code, §§ 16720, 16721.5). Plaintiff can also state a cause of action under the Unfair Competition Act (Bus. & Prof. Code, §§ 17200-17208), insofar as the claim is predicated on a violation of the Cartwright Act. However, plaintiff cannot sate a private cause of action under, or predicated on violations of, the Unfair Insurance Practices Act (Ins. Code, §§ 790-790.10).

BACKGROUND

The action concerns plaintiff's attempt to engage in business as a broker of, and consultant in connection with, settlement annuities. A settlement annuity is an annuity purchased by a liability carrier to fund a structured settlement in a personal injury action. A structured settlement is one in which the injury claimant agrees to accept periodic payments (i.e., the proceeds of an annuity) rather than a single lump sum. It appears to be conceded by all concerned that such an annuity is classified in this state as a form of life insurance. (See Ins. Code, § 101.)

The gist of the complaint's allegations contained in the four statutory counts with which we are now concerned is that defendants boycotted plaintiff's brokerage business because of opposition to plaintiff's conduct in providing injury claimants and their attorneys with information concerning the underlying features of settlement annuities, in particular their actual costs. Such disclosures were inimical to a plan defendants had formed to market settlement annuities as a way for liability carriers to settle injury claims below their cash settlement value. Therefore defendants schemed to

prevent claimants from acquiring such information. They pursued this scheme, in party, by boycotting and disparaging plaintiff, as a broker and consultant supplying such information to injury claimants.

Plaintiff alleges it built a successful brokerage and consulting business based upon advising and educating claimants and their attorneys in connection with various aspects of settlement annuities including those which concerned defendants. This conduct, however, interfered with defendants' marketing scheme. Accordingly, defendants coerced or induced suppliers of annuities to stop doing business with plaintiff. As a result, plaintiff's settlement annuities business was destroyed.

The first four surviving counts[1] allege violations of (1) Business and Professions Code section 16720, part of the Cartwright Act; (2) Business and Professions Code section 16721.5, also part of that act; (3) Insurance Code section 790.03, subdivision (c), part of the Unfair Insurance Practices Act; and (4) Business and Professions Code section 17200 et seq., the Unfair Competition Act (UCA).[2] Three

---

[1]At oral argument plaintiff expressly abandoned a fifth statutory cause of action, based on the Unruh Civil Rights Act (Civ. Code, § 51.5). Our discussion of the complaint will, naturally, disregard this count. In light of plaintiff's abandonment, however, we will direct the trial court to sustain the demurrer to this count.

[2]Insurance Code sections 790-790.10 are often referred to as the "Unfair Practices Act." (See *Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988)46 Cal.3d 287, 292 [250 Cal.Rptr. 116, 758 P.2d 58]; *Royal Globe Ins. Co. v. Superior Court* (1979) 23 Cal.3d 880, 883 [153 Cal.Rptr. 842, 592 P.2d 329], overruled in *Moradi-Shalal, supra,* 46 Cal.3d at pp. 292, 304.) The legislature, however, has mysteriously labeled this portion of the Insurance Code the "Unfair *Trade* Practices Act." (Ins. Code § 1620.2, subd. (a), italics added.) It has given the name "Unfair Practices Act" to sections 17000 through 17101 of the Business and Professions Code. (Bus. & Prof. Code, § 17000.) The Supreme Court has used that name to refer not only to those sections

other counts sound in tort and are not at issue in these writ proceedings.

In the earliest ruling before us, the trial court sustained demurrers to the Cartwright Act claims (counts 1 and 2) with leave to amend. However, it concluded that plaintiff had stated causes of action under the UIPA and the UCA (counts 4 and 5). Defendants filed petition No. A052795 seeking a writ of mandate directing the trial court to sustain the demurrers to these counts. We issued an alternative writ.

While that matter was pending, plaintiff amended the complaint and various defendants again demurred to the Cartwright Act counts. The trial court sustained those demurrers without leave to amend. Plaintiff filed petition No. A055038, seeking a writ which would direct the trial court to overrule the demurrers to those counts. We initially denied plaintiff's petition. Plaintiff sought review in the Supreme Court. That court granted the petition and retransferred the matter to us with directions to issue an alternative writ. We have done so.

---

but also to section 17200 et seq. (*Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 395 [6 Cal.Rptr.2d 487, 826 P.2d 730]; *State of California* ex rel. *Van de Kamp v. Texaco, Inc.* (1988) 46 Cal.3d 1147, 1169 [252 Cal.Rptr. 221, 762 P.2d 385]; cf. *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1260 [10 Cal.Rptr.2d 538, 833 P.2d 545] [describing § 17200 as part of "Unfair Business Practices Act"].)

To avoid this confusion of terms we will adopt our own nomenclature for the affected statutes. Thus we refer to Insurance Code sections 790 through 790.10 as the Unfair Insurance Practices Act (UIPA), Business and Professions Code sections 17000 through 17101 as the Unfair Business Practices Act (UBPA), and Business and Professions Code sections 17200 through 17208 as the Unfair Competition Act (UCA).

I. CARTWRIGHT ACT

A. Introduction

The Cartwright Act states a general prohibition against conduct effecting a combination in restraint of trade, i.e., a "trust." (Bus. & Prof. Code, Section Section 16720, 16721.5.) One common species of a trust is a "concerted refusal to deal with other traders, or, as it is often called, the group boycott." *(Marin County Bd. of Realtors, Inc. v. Palsson* (1976) 16 Cal.3d 920, 931 [130 Cal.Rptr. 1, 549 P.2d 833].) The prohibition on such conduct extends to "every type of business," including insurance. *(Speegle v. Board of Fire Underwriters* (1946) 29 Cal.2d 34, 43, 44, 46 [172 P.2d 867]; see *Marin County Bd. of Realtors, Inc. v. Palsson, supra,* 16 Cal.3d at pp. 927-928.)

At the same time, the UIPA prohibits acts of "boycott, coercion, or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance." (Ins. Code, § 790.03, subd. (c) [section 790.03(c)].) The major issue before us is whether the UIPA supplants the Cartwright Act so as to provide the *sole* basis by which unlawful conduct of the type alleged here may be subjected to legal restraint or may otherwise produce legal consequences.

In dealing with any problem of statutory effect, we begin and often end with the words of the statute. "[C]ourts are not at liberty to impute a particular intention to the Legislature when nothing in the language of the statute implies such intention." *(Dunn-Edwards Corp. v. Bay Area Air Quality Management Dist.* (1992) 9 Cal.App.4th 644, 658 [11 Cal.Rptr.2d 850], review den. [rejecting claim of implied exemption from general statute]; see Code Civ. Proc., § 1858.) The statute "must be construed with reference to the whole system of law of which it is a part, so that each part may be harmonized and have effect." (*Yoffie v. Marin*

Hospital Dist. (1987) 193 Cal.App.3d 743, 748 [238 Cal.Rptr. 502], review den.; see Code Civ. Proc., § 1858.) "This rule applies even if the statutes to be harmonized appear in different codes." (193 Cal.App.3d at p. 748.) "[T]he different codes blend into each other and constitute a single statute for the purposes of statutory construction and . . . legislative intent may be determined not only from an individual code but the whole body of law. *(Pesce v. Dept. Alcoholic Bev. Control* (1958) 51 Cal.2d 310, 312 [333 P.2d 15]; *American Friends Service Committee v. Procunier* (1973) 33 Cal.App.3d 252, 260 [109 Cal.Rptr. 22].)" (*Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 125 [174 Cal.Rptr. 744].)

As explained in the following discussion, we have concluded that the UIPA expressly preserves existing remedies for unlawful conduct in the business of insurance. Such preservation is consistent with the history of the UIPA and with the interpretational presumption against the implied repeal of statutory remedies. A contrary holding is not warranted by case law or by any claimed legislative ratification. Accordingly, the demurrers to the Cartwright Act claims should have been overruled.

B. Express Preservation of Existing Remedies

The UIPA itself expresses an affirmative intention and expectation that it will preserve intact existing remedies for insurance industry misconduct. Insurance Code section 790.09 states that the commissioner's issuance of a cease-and desist order shall not obstruct or impede the imposition of "civil liability or criminal penalty under the laws of this State" arising from the same conduct.[3]

---

[3]Insurance Code section 790.09 provides: "No order to cease and desist issued under this article directed to any person or subsequent administrative or judicial proceeding to enforce the same shall in any

Defendants have never offered a plausible interpretation of this statute consistent with the view that the UIPA supersedes the Cartwright Act. To be sure, the statute only refers to situations in which the commissioner issues a cease and desist order. Numerous absurdities would arise, however, if we concluded that the UIPA supersedes other laws in most cases, but preserves existing remedies when the commissioner issues such an order. This would make the commissioner's jurisdiction exclusive *only so long as it is not exercised* — a result which would appear to maximize the potential for jurisdictional conflict without creating any discernible benefit. Under such a regime, *mere administrative inaction* would cloak all manner of insurance misconduct with immunity. Furthermore, there would be no textual basis for withholding this immunity from criminal prosecutions as well, since Insurance Code section 790.09 mentions criminal penalties in tandem with civil remedies.

At oral argument defendants' counsel appeared to agree that a cease-and-desist order could not have the effect of restoring liability from which an insurer had otherwise become immune. Yet if Insurance Code section 790.09 does not have that effect it becomes meaningless under defendants' regime, for there is no "civil remedy" for the statute to preserve; any such remedy has been superseded by the UIPA as a whole. Section 790.09 can only be given meaning by acknowledging a *subsisting* "civil liability . . . under the laws of this state," to which violators are already subject when the commissioner issues a cease-and-desist order, and from which no such order "shall in any way relieve or absolve" them.

---

way relieve or absolve such person from any administrative action against the license or certificate of such person, civil liability or criminal penalty under the laws of this State arising out of the methods, acts or practices found unfair or deceptive."

The history of the UIPA indicates that the original bill did not contain a provision preserving civil remedies, but only a section preserving the commissioner's powers under existing law.[4] The first amended version of the bill and each successive version contained what is now Insurance Code section 790.09. (Assem. Amend. to Assem. Bill No. 1530 (1959 Gen. Sess.) Apr. 8, 1959; see Assem. Amend. to *id.*, May 6, 1959; Sen. Amend. to Assem. Bill No. 1530 (1959 Gen. Sess.) June 11, 1959; Stats. 1959, ch. 1737, § 1, p. 4191.) This provision originated even earlier, however, in the 1947 "Chicago Draft" of the Model Unfair Insurance Practices Act proposed by the National Association of Insurance Commissioners (NAIC).[5] Its pointed adoption in California may have emphasized a legislative perception that the UIPA effected little if any change in existing law. Indeed, at the time of the enactment of the UIPA the Legislative Analyst wrote that the bill would "make[ ] *no* substantive change in existing law." (Ops. Legis. Analyst, "Analysis of Assembly Bill No. 1530" (May 20, 1959) p. 1, italics added; exhibit 1 to Request for Judicial Notice filed Sept. 20, 1991, in A055038.)

If the Legislature wished to exempt the insurance industry from the Cartwright Act, it knew full well how to do so. The Insurance Code contains no fewer than four express exemptions of specified classes of insurance from other laws.

---

[4]"§ 790.11. The powers vested in the commissioner in this article shall be additional to any other powers to enforce any penalties, fines or forfeitures authorized by law with respect to the methods, acts and practices hereby declared to be unfair or deceptive." (Assem. Bill No. 1530 (1959 Reg. Sess.) § 1; see now Ins. Code, § 790.08.)

[5]"No order of the Commissioner under this Act or order of a court to enforce the same shall in any way relieve or absolve any person affected by such order from any liability under any other laws of this state." (Exhibit B to Rep. of Joint Com. on Federal Legislation etc. (Jan. 24, 1947) § 8(d); Proceedings, 78th Ann. Sess., NAIC (1947) p.398.)

(Ins. Code, §§ 795.7 [senior citizens' health insurance]; 1860.1 [casualty insurance]; 11758 [workers' compensation]; 12414.26 [title insurance].) All of these statutes would be superfluous if defendants' view of the UIPA were correct. Yet two of them were enacted well after the effective date of that act. (Stats. 1973, ch. 1130, § 15, p. 2314 [§ 12414.26]; Stats. 1963, ch. 2055, § 1, p. 4301 [§ 795.7].)

Our view that the UIPA effects no displacement of general laws is consistent with the commissioner's interpretation of the UIPA, not only as amicus curiae in this proceeding but as adviser to the Governor and litigant in other proceedings. Beginning when the UIPA was initially adopted, the Department of Insurance repeatedly expressed the view that the act would have little or no effect on California law, but was enacted primarily, if not entirely, to conform to the actions of other states.[6] Somewhat later, in *Royal Globe Ins. Co. v. Superior Court, supra*, 23 Cal.3d at page 897 (dis. opn.), Justice Richardson quoted the com-

---

[6]In a memorandum to the Governor, the Chief Assistant Insurance Commissioner indicated that the UIPA had been enacted in all but one other state and that it was expected to add little if anything to California law. He concluded, "The Department is neither opposed to nor an advocate for this Bill. We know of nothing in the Bill which is detrimental to the public interest." (J. Thomas, Mem. from Dept. of Ins. to Hon. Edmund G. Brown (June 30, 1959) pp. 1-2; exhibit 1 to Request for Judicial Notice filed Sept. 20, 1991, in A055038.)

A few years later , the same author wrote that the Model Act "had only a psychological application to states, such as New York and California[,] which already had extensive laws regulating practically every phase of the business .... [¶] California and some of the other active states hesitated [to adopt the Act] because it was difficult to justify the expense and time expenditure of enacting and having in the books an Act which, for all practical purposes, was unnecessary." (J. Thomas, Interdepartmental Mem. (May 17, 1960) pp. 1-2; exhibit 3 to Request for Judicial Notice filed Sept. 20, 1991, in A055038.)

missioner as flatly asserting that the UIPA "does not supplant other remedies available under state law."

Defendants assert that we should give no particular weight to the commissioner's interpretation. But the department's long standing interpretation, first conveyed to the Governor at the time of the act's adoption and espoused with apparently perfect consistency since, reinforces our view that the statute simply cannot support the interpretation defendants urge upon us. (See *Truta v. Avis Rent A Car System, Inc.* (1987) 193 Cal.App.3d 802, 814 [238 Cal.Rptr. 806], review den.; *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.* (1979) 24 Cal.3d 458, 491 [156 Cal.Rptr. 14, 595 P.2d 592].)

Defendants' claim of implied supersession also runs afoul of the interpretational presumption against implied repeal. An "implied repeal" occurs " '[w]hen a later statute supersedes or substantially modifies an earlier law but without expressly referring to it.' " (*Department of Personnel Administration v. Superior Court* (1992) 5 Cal.App.4th 155, 191 [6 Cal.Rptr.2d 714], review den., quoting *Sacramento Newspaper Guild v. Sacramento County Bd. of Suprs.* (1968) 263 Cal.App.2d 41, 54 [69 Cal.Rptr. 480].) Under this definition, defendants' argument must be viewed as relying on an implied partial repeal of the Cartwright Act, i.e., a repeal insofar as that act would otherwise apply to the business of insurance.

"[T]he law shuns repeals by implication." (Board of Supervisors v. Lonergan (1980) 27 Cal.3d 855, 868 [167 Cal. Rptr. 820, 616 P.2d 802]; *Kennedy Wholesale, Inc. v. State Bd. of Equalization* (1991) 53 Cal.3d 245, 249 [279 Cal.Rptr. 325, 806 P.2d 1360].) They "are recognized only where there is no rational basis for harmonizing two potentially conflicting laws." (*Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 7 [128 Cal.Rptr. 673, 547 P.2d 449], italics added.) "The presumption against implied

repeal is so strong that, 'To overcome the presumption the two acts must be *irreconcilable, clearly repugnant,* and so inconsistent that the two cannot have concurrent operation. The courts are bound, if possible, to maintain the integrity of both statutes if the two may stand together.' (*Penziner v. West American Finance Co.* [(1937)] 10 Cal.2d 160, 176 [74 P.2d 252].) There must be '*no possibility* of concurrent operation.' *(Hays v. Wood* (1979) 25 Cal.3d 772, 784 ...) ...[I]mplied repeal should not be found unless '...the later provision gives *undebatable evidence* of an intent to supersede the earlier...' *(Ibid...)*" *(Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist.* (1989) 49 Cal.3d 408, 419-420 [261 Cal.Rptr. 384, 777 P.2d 157], first and second italics added; see *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 379 [20 Cal.Rptr.2d 330, 853 P.2d 496].)[7]

Amici curiae California Chamber of Commerce et al. suggest that the presumption against implied repeal does not fully apply where a general statute overlaps an "administrative regulatory scheme." We find no support for this assertion in the case cited by amici curiae (*Gordon v. New York Stock Exchange* (1975) 442 U.S. 659 [45 L.Ed.2d 463, 95 S.Ct. 2598]), or in any other authority. At most, schemes regulating in minute detail may produce such pervasive conflicts with preexisting laws that the two cannot coexist and are, for that reason, mutually repugnant. (See *I.E. Associates v. Safeco Title Ins. Co., supra,* 39 Cal.3d at

---

[7]Statutes are also presumed to be consistent with the common law. *(Dry Creek Valley Assn., Inc. v. Board of Supervisors (1977)* 67 Cal.App.3d 839, 844 [135 Cal.Rptr. 726]; see *Rojo v. Kliger* (1990) 52 Cal.3d 65, 75 [276 Cal.Rptr. 130, 801 P.2d 373]; *Lacher v. Superior Court* (1991) 230 Cal.App.3d 1038, 1050 [281] Cal.Rptr. 640], review den.; cf. *I.E. Associates v. Safeco Title Ins. Co.* (1985) 39 Cal.3d 281, 285 [216 Cal.Rptr. 438, 702 P.2d 596].) In this regard, we observe that plaintiff's antitrust claims have their roots in common law. (See *Speegle v. Board of Fire Underwriters, supra,* 29 Cal.2d at pp. 44, 45, 46.)

p. 285.) The mere presence of administrative regulation, no matter how broad the regulatory authority, does not in itself create an irreconcilable conflict or otherwise warrant an inference of intent to repeal.

Nor may defendants avoid the presumption against implied repeal by relying on different terminology. In particular we reject the claim that the UIPA presumptively provides an "exclusive remedy" for conduct covered by its terms. Repeal by any other name is still repeal, and a claim of implied repeal is viewed with skepticism no matter how it is characterized. (See *Physicians & Surgeons Laboratories, Inc. v. Department of Health Services* (1992) 6 Cal.App.4th 968, 985-986 [8 Cal.Rptr.2d 565], review den. [applying presumption against implied repeal in rejecting claim that new regulation superseded existing ones]; *Rojo v. Kliger, supra,* 52 Cal.3d at p. 80 [new statutory remedy deemed exclusive only if it exhibits "a legislative intent to displace all preexisting or alternative remedies"]; *McKee v. Bell-Carter Olive Co.* (1986) 186 Cal.App.3d 1230, 1244-1245 [231 Cal.Rptr. 304], review den. [new statutory remedy generally regarded as cumulative, not exclusive]; *Hentzel v. Singer Co.* (1982) 138 Cal.App.3d 290, 301 [188 CalRptr. 159, 35 A.L.R.4th 1015]; *Glaser v. Meyers* (1982) 137 Cal.App.3d 770, 774 [187 Cal.Rptr. 242]; 3 Witkin, Cal. Procedure (3d ed. 1985) Actions, § 8, p. 39.)

We also observe a certain illogic in referring to the UIPA as providing an "exclusive remedy" when, as we conclude in the following section, it provides no private remedy at all. Nor does it empower the commissioner to redress private injuries. (See *Shernoff v. Superior Court* (1975) 44 Cal.App.3d 406, 409 [118 Cal.Rptr. 680] [commissioner's authority "is limited to restraint of future illegal conduct . . . , and he possesses no authority to enter money judgments for past injuries"]; *Greenberg v. Equitable Life Assur. Society* (1973) 34 Cal.App.3d 994, 1001 [110

Cal.Rptr. 470] ["the sole disciplinary authority of the commissioner would be to issue a cease and desist order or obtain an injunction to restrain the illegal conduct"].) Courts are particularly reluctant to view a statute as affording an exclusive remedy when it appears inadequate to redress the wrong toward which it is directed. (3 Witkin, *op. cit. supra,* § 9, p. 40; *Orloff v. Los Angeles Turf Club* (1947) 30 Cal.2d 110, 113 [180 P.2d 321, 171 A.L.R. 913]; see *Rojo v. Kliger, supra,* 52 Cal.3d at pp. 80-82 [given various limitations, Fair Employment and Housing Act did not displace other remedies]; *Farmers Ins. Exchange v. Superior Court, supra,* 2 Cal.4th 377, 391-392, fn. 9 [discretionary relief from "primary jurisdiction" doctrine where administrative remedy inadequate].) Here, the denial of a Cartwright Act claim would deprive plaintiff, and others in its position, of any remedy whatsoever for substantial damages resulting from concededly unlawful conduct. No justification for such a regime has been proposed, and we discern none.

Nothing in the UIPA suggests a purpose, unmistakable or otherwise, to displace existing state-law remedies. Rather the avowed purpose of the act was to displace federal law to the maximum extent possible in accordance with the offer of federal abstention embodied in the McCarran-Ferguson Act, 15 United States Code Annotated sections 1011-1015 (hereafter McCarran).[8] (See *Karlin v. Zalta* (1984) 154 Cal.app.3d 953, 966 [201 Cal.Rptr. 379]; *American Internat. Group, Inc. v. Superior Court* (1991) 234

---

[8]"The purpose of this article is to regulate trade practices in the business of insurance in accordance with the intent of Congress as expressed in the Act of Congress of March 9, 1945 (Public Law 15, Seventy-ninth Congress), by defining, or providing for the determination of, all such practices in this State which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined." (Ins. Code, § 790.)

Cal.App.3d 749, 756-758 [285 Cal.Rptr. 765], review den.) Under McCarran, federal law is inapplicable to insurance insofar as the state "generally proscribes" (or permits) certain conduct. (*Ohio AFL-CIO v. Insurance Rating Board* (6th Cir. 1971) 451 F.2d 1178, 1181, 1184, cert. den. (1972) 409 U.S. 917 [34 L.Ed.2d 180, 93 S.Ct. 215]; *California League of Ind. Ins. Pro. v. Aetna Cas. & S. Co.* (N.D.Cal. 1959) 175 F.Supp. 857, 860.) "The condition of state regulation is satisfied by 'a state regulatory scheme possess[ing] jurisdiction over the challenged practice.' " (*In re Insurance Antitrust Litigation* (N.D.Cal. 1989) 723 F.Supp. 464, 474, revd. on other grounds (9th Cir. 1991) 938 F.2d 919; quoting *Feinstein v. Nettleship Co. of Los Angeles* (9th Cir. 1983) 714 F.2d 928, 933, cert. den. (1984) 466 U.S. 972 [80 L.Ed.2d 82, 104 S.Ct. 2346]; brackets in *Antitrust.*) In other words, the mere *assertion* of state jurisdiction is sufficient to preclude the application of federal antitrust law under McCarran.

By enacting the UIPA, the Legislature explicitly accepted the federal offer of abstention on the broadest possible terms, using language designed to ensure that the entire insurance industry was brought under the state's jurisdiction. Nothing in the statute suggests an intent to shelter the insurance industry from state laws.[9] (See *Rojo v. Kliger, supra,* 52 Cal.3d at p. 81 [statute expressing intent to "occupy the field" displaced local regulation, not other state legislation].)

---

[9]Amici curiae California Chamber of Commerce et al. describe the UIPA as "answer[ing] a concern expressed by the California Supreme Court" in *Speegle v. Board of Fire Underwriters, supra,* 29 Cal.2d 34, 45. It is true that the court noted the absence of "special legislation" in this state against combinations in restraint of the insurance trade. But the only "concern" expressed in the cited passage is the potential effect of *denying enforcement of the Cartwright Act* in the insurance business. Certainly the court had no intention of prognosticating upon the hypothetical preemptive effect of statutes which did not then exist.

C. Case Law

Defendants' challenge to the Cartwright Act claims ultimately rests on a single sentence in *Chicago Title Ins. Co. v. Great Western Financial Corp.* (1968) 69 Cal.2d 305, 322 [70 Cal.Rptr. 849, 444 P.2d 481]: "These statutes and the common law which once constituted 'the protection of the public against combinations in restraint of the insurance trade' (*Speegle v. Board of Fire Underwriters,* 29 Cal.2d 34, 45 [172 P.2d 867]) are now expressly superseded and contravened by the specific provisions of the Insurance Code." After scrutinizing this statement in context, we have concluded that *Chicago Title* is neither compelling nor persuasive authority for a rule holding the Cartwright Act superseded by the UIPA.

The quoted statement is dictum. Dictum is the "statement of a principle not necessary to the decision." (*People v. Squier* (1993) 15 Cal.App.4th 235, 240 [18 Cal.Rptr.2d 536], internal quotation marks omitted.) The *holding* of *Chicago Title* is that the complaint failed to adequately plead the elements of a Cartwright Act cause of action, or any other claim. The court undertook a painstaking count-by-count analysis of the complaint, identifying numerous factual and legal deficiencies.[10] If the Supreme Court had believed that the statutes cited by the plaintiffs (including the Cartwright Act) were superseded by the Insurance

---

[10]For example: "We are persuaded . . . that appellants' vague and conclusionary pleadings fail to allege facts which might reasonably be construed to reveal a wrongful combination." (*Chicago Title Ins. Co. v. Great Western Financial Corp., supra,* 69 Cal.2d at p. 315.)

"[T]he factual allegations, as illustrated, fail in each instance to support the charge. Just as the earlier counts state facts insufficient to establish proscribed conduct on the parts of the alleged actors and thus cannot reach their purported conspirators, so the final counts charging antitrust infringements fall for similar reasons." (69 Cal.2d at p. 323, brackets original.)

Code, there would have been no occasion for this discussion. But the court explicitly identified factual insufficiency as the "determinative" issue.[11]

Dictum, of course, is not controlling authority even when it emanates from the Supreme Court. (*Grange Debris Box & Wrecking Co. v. Superior Court* (1993) 16 Cal.App.4th 1349, 1358 [20 Cal.Rptr.2d 515]; cf. *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [20 Cal.Rptr. 321, 369 P.2d 937]; *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 734-735 [257 Cal.Rptr. 708, 771 P.2d 406].) Nonetheless it " 'carries persuasive weight and should be followed where it demonstrates a thorough analysis of the issue or reflects compelling logic.' " (*Grange, supra,* at p. 1358; citations omitted.) *Chicago Title's* statement concerning Insurance Code exclusivity satisfies neither of these requirements.

Like most of the opinion in *Chicago Title,* the quoted statement was authored by a Court of Appeal and "adopted" by the Supreme Court. (69 Cal.2d at p. 311.) This in itself does not warrant lessened deference, but the statement also betrays a certain lack of authorial attention. To begin with, it confuses the Cartwright Act with the UBPA. The subject dictum is immediately preceded by a citation to Business and Professions Code sections 17040-17051. (69 Cal.2d at p. 322.) These statutes are part of the UBPA and not, as the author of the dictum seemed to

---

"The allegation of boycott cannot be supported in this instance because everyone has the unrestricted right to select customers and sources of supply." (69 Cal.3d at p. 324.)

[11] "We must determine . . . whether the superior court has jurisdiction to entertain an action based upon appellants' theories, or any of them, and, if so, whether appellants have stated a cause of action against any of the various named defendants. *The latter finding, which is determinative,* is in the negative." (*Chicago Title Ins. Co v. Great Western Financial Corp., supra,* 69 Cal.2d at p. 313, italics added.)

believe, the Cartwright Act. (See *ibid.*; cf. *id.* at pp. 315, 322 [correctly defining "Cartwright Act"]; Food & Agr. Code, §§ 66524, 65521 [same]; *Speegle v. Board of Fire Underwriters, supra*, 29 Cal.2d at p. 42 [same]; cf. Bus. & Prof. Code, § 17000 [defining "Unfair Practices Act"].) [12] The statement that "these statutes" have been superseded by the Insurance Code is thus burdened with a glaring anomaly.

Moreover, the court never identified *any* provision of the Insurance Code which "*expressly* superseded and contravened" *any* other statute. In particular, *the opinion never mentioned the UIPA.* Instead it cited certain provisions of the Insurance Code involving the regulation of *title insurance rates.* (*Chicago Title Ins. Co. v. Great Western Financial Corp., supra*, 69 Cal.2d at pp. 322-323, citing Ins. Code, §§ 12404-12412.) None of those provisions could be said to "expressly abrogate" any other statute. Indeed, some five years later the Legislature *did* enact an express exemption covering some of the activities authorized by the cited portion of the code. (Ins. Code., § 12414.26, added by Stats. 1973, ch. 1130, § 15, p. 2314.) The absence of such a statute in 1968 renders the *Chicago Title* dictum nearly unintelligible. Certainly the Legislature could not have given that case the meaning defendants do, or it would not have bothered to enact the cited statute.

The two paragraphs immediately following the subject dictum suggest that three of the complaint's eleven counts might intrude upon the commissioner's jurisdiction over title insurance rates. (*Chicago Title Ins. Co. v. Great Western Financial Corp., supra*, 69 Cal.2d at pp. 322-323.) None of these three counts invoked the Cartwright Act. We note sharp historical and analytical distinctions between the regu-

---

[12]Concerning our use of the term "Unfair Business Practices Act," see footnote 2, *ante.*

lation of rate-setting practices and the broad prohibitions in the UIPA. (See *Karlin v. Zalta*, *supra*, 154 Cal.App.3d at pp. 973-977.)

The court thus seemed to say no more than that *part* of the complaint *might* intrude upon regulatory turf. Even with respect to that part of the complaint, however, the court ultimately returned to its *holding*, declaring that the factual allegations under scrutiny "fail in each instance to support the charge" and that the counts discussed to that point "state facts insufficient to establish proscribed conduct." (*Chicago Title Ins. Co. v. Great Western Financial Corp.*, *supra*, 69 Cal.2d at p. 323.) The court only then turned to claims having any bearing here, declaring that ". . . the final counts charging antitrust infringements fall for similar reasons." (*Ibid.*) On the next page, the Supreme Court itself inserted a declaration that the Cartwright Act counts failed "because plaintiffs' vague and conclusionary pleadings fail to allege sufficient facts." (*Id.* at p. 324.)

It thus appears that the subject dictum means at *most* that the three claims concerning rates were repugnant, or potentially repugnant, to the "specific provisions of the Insurance Code" concerning rate setting. The allusion to the *Speegle* case, and thus apparently to the Cartwright Act, was not only dictum, but unsound. (See 9 Witkin, *op. cit. supra*, Appeal, § 795, p. 768, quoting *In re Johnson* (1949) 92 Cal.App.2d 467, 470 [207 P.2d 123].)

Indeed, if we held California's general antitrust laws superseded by the UIPA, we would stand alone in opposition to "general law throughout the country." (9 Witkin, *op. cit. supra*, Appeal, § 799, p. 772.) Every court to address the issue has concluded that its version of the UIPA does *not* displace general laws regulating unlawful trade restraints or unfair competition. (*Mead v. Burns* (1986) 199 Conn. 651 [509 A.2d 11, 18]; *Dodd v. Commercial Union Ins. Co.* (1977) 373 Mass. 72 [365 N.E.2d 802, 803-806]; *Fisher*,

etc. v. Forrest T. Jones & Co. (Mo. 1979) 586 S.W.2d 310 [general antitrust law applied to claimed conspiracy to withhold necessary information from potentially competing brokers]; *St. ex rel Stratton v. Gurley Motor Co.* (1987) 105 N.M. 803 [737 P.2d 1180, 1182-1184]; *Ray v. United Family Life Ins. Co.* (W.D.N.C. 1977) 430 F.Supp. 1353, 1356-1357, approved in *Ellis v. Smith-Broadhurst, Inc.* (1980) 48 N.C.App. 180 [268 S.E.2d 271, 273]; *Skinner v. Steele* (Tenn.App. 1987) 730 S.W.2d 335, 337-338 [purpose of act was to "oust federal antitrust jurisdiction as completely as possible," not to exempt insurance from other state statutes]; *Attorney General of Tex. v. Allstate Ins. Co.* (Tex.Civ.App. 1985) 687 S.W.2d 803, 805; *Grams v. Boss* (1980) 97 Wis.2d 332 [294 N.W.2d 473, 480].) Several of these courts expressly cited their states' respective versions of Insurance Code section 790.09. (See *Mead v. Burns, supra*, 509 A.2d at p. 17; *Dodd v. Commercial Union Ins. Co., supra*, 365 N.E.2d at p. 804; *Skinner v. Steele, supra*, 730 S.W.2d at p. 338; *Attorney General of Tex. v. Allstate Ins. Co., supra*, 687 S.W.2d at p. 805.)[13]

Defendants cite *Greenberg v. Equitable Life Assur. Society, supra*, 34 Cal.App.3d 994, where the court stated in a footnote that under *Chicago Title*, the Cartwright Act was "superseded and contravened" by the Insurance Code. (34 Cal.App.3d 994, 999, fn. 2.) However, the court explained *Chicago Title's* lengthy discussion of pleading issues by

---

[13]Apparently failing to discover this solid edifice of adverse sister-state authority, defendants cite only *Chick's Auto Body v. State Farm, etc.* (1979) 168 N.J.Super. 68 [401 A.2d 722], affd. (1980) 176 N.J.Super. 320 [423 A.2d 311]. That case is patently inapposite because it rests on an express exemption from that state's antitrust laws for the activities of insurers " 'to the extent that such activities are subject to regulation by the Commissioner of Insurance.' " (401 A.2d at p. 724, citing N.J. Stat. Ann. § 56:9-5, subd. (b)(4).) We can find no fault with the court's analysis. Nor can we find any guidance in it, for this state has no such statute.

attributing it to tacit recognition of a private right of action under Insurance Code section 790.03. This reading of *Chicago Title* is untenable. As previously noted, the court in *Chicago Title* never mentioned the UIPA. The only sections of the Insurance Code cited in proximity to the "superseded and contravened" language dealt with title insurance rates. (69 Cal.2d at pp. 322-323.)

Furthermore, the premise on which the *Greenberg* interpretation of *Chicago Title* rests that the UIPA itself affords a private right of action has been flatly repudiated by the Supreme Court in *Moradi-Shalal v. Fireman's Fund Ins. Companies, supra*, 46 Cal.3d at page 304. While rejecting the attempt to predicate new rights of action on the UIPA, the court in *Moradi-Shalal* emphasized that existing remedies were unaffected by that act. It "urge[d] the Insurance Commissioner *and the courts* to continue to enforce the laws forbidding [unlawful insurance] practices to the full extent consistent with our opinion," and declared that "... the courts retain jurisdiction to impose civil damages or other remedies against insurers in appropriate common law actions, based on such traditional theories as fraud, infliction of emotional distress, and (as to the insured) either breach of contract or breach of the implied covenant of good faith and fair dealing." (*Id.* at pp. 304-305, italics added.)

Defendants assert that *Moradi-Shalal* recognizes only the preservation of *common law* claims, not those based on statute. Such a scheme, however, would fail to protect the putative exclusivity of regulatory jurisdiction, while forcing prospective plaintiffs, for no apparent reason, to attempt to conform their claims to obsolete pre-Cartwright forms. We are no more willing to attribute such bizarre distinctions to the Supreme Court than to the Legislature.

We understand the reference to the common law in *Moradi-Shalal* to rest on the premise that the cause of action asserted there — unfair claims practices — had no

statutory basis outside the UIPA. Since the UIPA itself afforded no right of action, the plaintiff was relegated to such common law claims as might be available.

Moradi-Shalal marks a return to the fundamental principle that the UIPA, like all statutes, is to be applied according to its terms. Its language neither creates new private rights *nor destroys old ones.* This was the view of Justice Richardson, whose dissent in *Royal Globe Ins. Co. v. Superior Court, supra,* 23 Cal.3d at pages 895-898, was heavily cited in *Moradi-Shalal.* (46 Cal.3d at pp. 294-296.) He wrote that section 790.09 "preserves *any* preexisting civil or criminal liability which the insurer might face under *other statutory or decisional law.*" (*Royal Globe, supra,* 23 Cal.3d at p. 893, some italics added; see *id.* at p. 896.) Similarly, the court in *Shernoff v. Superior Court, supra,* 44 Cal.App.3d 406, 409, acknowledged that Insurance Code section 790.09 "expressly reserves to litigants all civil and criminal remedies against persons who have violated the law." (Italics added.) These authorities are consistent with the language of the statute and with the *unanimous* view of courts elsewhere. Insofar as *Greenberg* reached a contrary conclusion, it must be considered unsound.

For these reasons we are disinclined to follow later cases which, in dicta, uncritically accepted *Greenberg's* view of UIPA exclusivity. The court in *Liberty Transport Inc. v. Harry W. Gorst Co.* (1991) 229 Cal.App.3d 417, 432 [280 Cal.Rptr. 159], disapproved on another point in *Adams v. Murakami* (1991) 54 Cal.3d 105, 116 [284 Cal.Rptr. 318, 813 P.2d 1348], followed *Greenberg* because, due to the limited retroactivity of *Moradi-Shalal,* it had to apply the law in effect under *Royal Globe.* (229 Cal.App.3d at p. 426, fn. 1.) In *Karlin v. Zalta, supra,* 154 Cal.App.3d 953, the court ultimately concluded that the claims before it were not governed by the UIPA but by the McBride-Grunsky Insurance Regulatory Act. (At p. 979.) It had no occasion to

reconsider *Greenberg's* reading of *Chicago Title* since it found both cases (along with *Royal Globe*) inapposite. (*Ibid.*)

We reject any notion that defendants' claim of exemption from the antitrust laws, however unsound, rests upon a settled rule and is therefore sheltered by the doctrine of *stare decisis*. (See 9 Witkin, *op. cit. supra*, Appeal, §§ 787, 795, pp. 758, 768-769.) *No court has ever held that insurance companies are immune from civil liability for antitrust injuries.* Rather, some cases — notably *Greenberg* and *Royal Globe* — mistook the statute under which such remedy should be pursued. Defendants seek to blend those discredited cases with the anomalous and misleading dictum in *Chicago Title*, and the corrective holding of *Moradi-Shalal*, to fashion a new immunity made of odds and ends and resting neither on statute nor principle but on misconstrued precedents. We decline to adopt such a course based on the false invocation of stare decisis.

D. Subsequent Ratification

Defendants contend that the Legislature ratified *Chicago Title* and *Greenberg* by amending the UIPA on several occasions "without altering the rule articulated in those opinions." This contention is unsound.

The rule of subsequent ratification applies to statutes which "have previously been judicially *construed*." (*Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 734 [180 Cal.Rptr. 496, 640 P.2d 115, 30 A.L.R.4th 1161], cert. den., 459 U.S. 858 [74 L.Ed.2d 111, 103 S.Ct. 129].) (Italics added.) No case has construed the UIPA to bar Cartwright Act claims. The court in *Greenberg* merely cited *Chicago Title* for the proposition that unspecified provisions of the Insurance Code superseded the Cartwright Act. (*Greenberg v. Equitable Life Assur. Society*, *supra*, 34 Cal.App.3d at p. 999, fn. 2, citing *Chicago Title Ins. Co. v. Great Western*

Financial Corp., 69 Cal.2d at p. 322.) As we have already noted, *Chicago Title* never so much as mentioned the UIPA. Ensuing cases repeated *Greenberg's* conclusion without seeking or offering any justification in the language of the UIPA or any other statute. Since none of the cases purports to "construe" a statute, an inference of legislative approval is wholly unwarranted.

Moreover, the holding in *Greenberg,* and then in *Royal Globe,* granted persons suffering antitrust injuries the substantial remedial equivalent of a Cartwright Act claim. These developments deprived the Legislature of any concrete reason to correct the courts' error. As the Supreme Court has acknowledged, the Legislature is concerned with " 'bottom-line' results" and is unlikely to fine-tune judicial decisions. (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1157 [278 Cal.Rptr. 614, 805 P.2d 873].)

E. Proposition 103

The parties devote considerable attention to Proposition 103, by which the voters in 1988 substantially revised the McBride-Grunsky Insurance Regulatory Act of 1947, Insurance Code sections 1850-1860.3 (McBride-Grunsky). (See Stats. 1947, ch. 805, § 1 et seq., p. 1896 et seq.) That act previously authorized casualty insurers to cooperate in rate setting and other matters in way which might otherwise violate antitrust laws. (See Ins. Code, former §§ 1853-1853.8.) Proposition 103 repealed these provisions. It also added a declaration that the insurance industry "shall be subject to the laws of California applicable to any other business, including, but not limited to, the Unruh Civil Rights Act . . . , and the antitrust and unfair business laws . . . ." (Ins. Code, § 1861.03, subd. (a).)

If Insurance Code section 1861.03 stood by itself it would easily dispose of this case by explicitly subjecting defendants to state antitrust law. In context, however, it is unclear

whether the statute reaches life insurance. McBride-Grunsky is by its terms inapplicable to life insurance. (Ins. Code, § 1851, subd. (b).) On the other hand, if section 1861.03 does not subject defendants to the Cartwright Act, Proposition 103 appears to be irrelevant to this case.

Defendants point out that the ballot summary concerning Proposition 103 stated that under then-existing law, insurance companies were "not subject to the state's antitrust laws." However, such a summary " 'cannot supply language which does not appear [on the face of the initiative].' " (*Sanford* v. *Garamendi* (1991) 233 Cal.App.3d 1109, 1123 [284 Cal.Rptr. 897], review den., brackets in original; quoting *Metropolitan Water District* v. *Dorff* (1979) 98 Cal.App.3d 109, 115 [159 Cal.Rptr. 211].) Obviously, it cannot supply language missing from *existing* laws. Indeed, courts are never bound by a legislative statement concerning the intent of a prior enactment. (*Droeger* v. *Friedman, Sloan & Ross* (1991) 54 Cal.3d 26, 44, fn. 14 [283 Cal.Rptr. 584, 812 P.2d 931].)

We conclude that the UIPA does not pose an impediment to plaintiff's claims under the Cartwright Act.

II. UNFAIR INSURANCE PRACTICES ACT

As previously noted, the Supreme Court has already determined that the UIPA does not create a private right of action for violations of its terms. (*Moradi-Shilal* v. *Fireman's Fund Ins. Companies, supra,* 46 Cal.3d 287, 304.) Plaintiff asks us to distinguish that case on the ground that it involved unfair claims practices prohibited by Insurance Code section 790.03, subdivision (h), whereas this case involves an unlawful boycott in violation of subdivision (c). We see no basis, however, for such a distinction here.

Moradi-Shilal's conclusion that the UIPA does not create private rights of action appears fully applicable to any

unlawful conduct in the business of insurance. The court in effect concluded that Royal Globe had misconstrued Insurance Code section 790.09 to recognize a right of action, when in fact there was no textual basis for such a right. It may remain possible, at least theoretically, to judicially "imply" a right of action for some violations of the UIPA. Even were we to accept that theoretical possibility, however, the conditions for such an implied right of action are not satisfied here.

Before a court may imply a right of action based on violations of a substantive statute it must appear that (1) the plaintiff belongs to the class of persons the statute is intended to protect; (2) a private remedy will appropriately further the purpose of the legislation; and (3) such a remedy appears to be "needed to assure the effectiveness" of the statute. (Rest.2d Torts, § 874A, quoted and applied in *Middlesex Ins. Co. v. Mann* (1981) 124 Cal.App.3d 558, 570 [177 Cal.Rptr. 495].)

In this case the third element of this test is not satisfied, if only because the Cartwright Act already grants plaintiff remedies which will "assure the effectiveness" of section 790.03(c). Accordingly, there is occasion to "imply" a private remedy under the UIPA and plaintiff has not stated a cause of action under that statute. (See *Arriaga v. Loma Linda University* (1992) 10 Cal.App.4th 1556, 1564 [13 Cal.Rptr.2d 619], review den.)

III. UNFAIR COMPETITION ACT

The UCA defines as "unfair competition" any "unlawful, unfair or fraudulent business act or practice," (Bus. & Prof. Code, § 17200.) It broadly authorizes "any person" to sue on behalf of the general public for injunctive and restitutionary relief based on such practices. (§§ 17204, 17203.) The act declares that "[u]nless otherwise expressly provided," its remedies are "cumulative to each other and to the

remedies or penalties available under all other laws of this state." (§ 17205.)

Plaintiff seeks to base UCA claims on both the Cartwright Act and the UIPA. The former theory is sound; the latter is not.

Violations of the Cartwright Act may constitute the predicate acts for a claim under the UCA. (*People v. National Association of Realtors* (1981) 120 Cal.App.3d 459, 473-475 [174 Cal.Rptr. 728], later appeal (1984) 155 Cal.App.3d 578 [202 Cal.Rptr. 243]; *B.W.J. Kitchen v. Owens-Illinois, Inc.* (1987) 191 Cal.App.3d 1341, 1348, fn. 6 [235 Cal.Rptr. 228], review den.)

Existing authority, however, precludes reliance on the UCA to " 'plead around' absolute barriers to relief by relabeling the nature of the action as one brought under the unfair competition statute." (*Rubin v. Green* (1993) 4 Cal.4th 1187, 1201 [17 Cal.Rptr.2d 828, 847 P.2d 1044].) It is thus settled that the UCA cannot be utilized to confer private standing to enforce the UIPA. In *Rubin v. Green, supra,* the Supreme Court cited approvingly three decisions which, as the court put it, "held that the bar on . . . implied private causes of action, imposed by our decision in *Moradi-Shalal* . . . may not be circumvented by recasting the action as one under Business and Professions Code section 17200." (*Id.* at p. 1202, citing *Safeco Ins. Co. v. Superior Court* (1990) 216 Cal.App.3d 1491 [265 Cal.Rptr. 585]; *Maler v. Superior Court* (1990) 220 Cal.App.3d 1592 [270 Cal.Rptr. 222], review den., *Industrial Indemnity Co. v. Superior Court* (1989) 209 Cal.App.3d 1093 [257 Cal.Rptr. 655]; see also *American Internat. Group, Inc. v. Superior Court, supra,* 234 Cal.App.3d at p. 768.)

It follows that the demurrers to the UCA cause of action were properly overruled because plaintiff has stated a viable cause of action predicated on defendant's alleged violations

of the Cartwright Act. Plaintiff may pursue the equitable remedies afforded by the UCA insofar as those allegations are borne out in further proceedings. Plaintiff may not pursue remedies under the UCA based upon posited violations of the UIPA.

DISPOSITION

In No. A052795, let a peremptory writ of mandate issue directing the superior court to set aside its order of January 25, 1991, insofar as that order overruled defendants' demurrers to the third cause of action (Unruh Civil Rights Act) and the fourth cause of action (Ins. Code, § 790.03, subd. (c)), and to sustain those demurrers to said causes of action without leave to amend. The alternative writ is otherwise discharged.

In No. A055038, let a peremptory writ of mandate issue directing the superior court to set aside its order of July 23, 1991, insofar as that order sustained defendants' demurrers to the first and second causes of action (Cartwright Act) and to overrule the demurrers to those causes of action.

The alternative writ is otherwise discharged.

Smith, Acting P.J., and Phelan, J., concurred.

APPENDIX G

SUPREME COURT
FILED
October 13, 1994
Robert Wandruff
Deputy Clerk

ORDER GRANTING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL
First Appellate District,
Division Two, A055038,
A052795 - S031022

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

WEIL INSURANCE AGENCY INCORPORATED, Petitioner

v.

SAN FRANCISCO COUNTY SUPERIOR COURT, Respondent
MANUFACTURERS LIFE INSURANCE CO. et al.,
Real Parties in Interest

Petition for review GRANTED.

Lucas
Chief Justice

Kennard
Associate Justice

Baxter
Associate Justice

George
Associate Justice

Werdegar
Associate Justice

Associate Justice

Associate Justice

(2) 94-1328
No.

Supreme Court, U.S.
FILED
MAR 3 1995
OFFICE OF THE CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1994

LEGAL ECONOMIC EVALUATIONS, INC.;
IBAR SETTLEMENT COMPANY; and
WEIL INSURANCE AGENCY, INC.
Petitioners,
v.
METROPOLITAN LIFE INSURANCE COMPANY, et al.
Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT M. MITCHELL
PETER E. ROMO, JR.
LUANNE SACKS
(Counsel Of Record)
DARREN S. WEINGARD
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
101 California Street
Suite 2900
San Francisco, CA 94111
Telephone: (415) 397-2823

Attorneys for Respondent
The Prudential Insurance Company Of America

Additional Parties And Counsel Listed On The Last Page

Bowne of Los Angeles, Inc., Law Printers (213) 627-2200

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether a private plaintiff which fails to demonstrate injury to itself linked to injury to competition in the relevant market satisfies the antitrust injury burden imposed upon every private enforcement action by Section 4 of the Clayton Act.

2. Whether a federal court erred in adjudicating federal antitrust claims within its exclusive federal jurisdiction in the face of Petitioners' motion to stay the case prompted by Petitioners' desire to await the outcome of their pending state court action.

THE PARTIES

Respondents do not dispute the description of the parties set forth in the Petition.

CORPORATE DISCLOSURE STATEMENT (SUPREME COURT RULE 29.1)

Respondent/Defendant The Prudential Insurance Company of America states that there are no parent companies, subsidiaries or affiliates that have issued any shares of stock to the public.

Respondent/Defendant National Structured Settlements Trade Association states that the following members and parent companies are publicly traded:

Aetna Casualty & Surety Co.
Aetna Life Insurance and Annuity Company
(Subsidiaries of Aetna Life & Casualty Co.)

Alexander Hamilton Life Insurance Co. of America
(Subsidiary of Household Group, Inc.)

Allstate Life Insurance Co.
(Subsidiary of Allstate Insurance Co.)

American General Life Insurance Company
(Subsidiary of American General Corporation)

American International Adjustment Co., Inc.
(Subsidiary of American International Group, Inc.)

Berkshire Hathaway Life National Indemnity
(Subsidiary of Berkshire Hathaway, Inc.)

Capital Holding Company

Continental Assurance Co., Inc.
(Subsidiary of Continental Casualty Co., Inc.)

Continental Casualty Co., Inc.
(Subsidiary of SNA Financial Corp.)

CNA Structured Settlement, Inc.
(Subsidiary of CNA Financial Corporation)

Federal Home Life Insurance Co.
(Subsidiary of Harcourt Brace Jovanovich Inc.)

First Colony Life Insurance Co., Inc.
(Subsidiary of Ethyl Corp.)

GE Capital Assignment Corp.
(Subsidiary of General Electric Co.)

Hartford Life Insurance Co.
Hartford Fire Insurance Co.
(Subsidiaries of ITT Corp.)

Integrity National Life Insurance Co.
(Subsidiary of ICH Corp.)

Liberty Life Assurance Corp.
(Subsidiary of Liberty Corp.)

Lincoln National Structured Settlements, Inc.
(Subsidiary of Lincoln National Corp.)

Merrill Lynch Settlement Services
(Subsidiary of Merrill Lynch & Co., Inc.)

PaineWebber, Inc.
(Subsidiary of PaineWebber Group, Inc.)

Providian Capital Management
(Subsidiary of Providian Corporation)

Reliance National Risk Specialists
(Subsidiary of Reliance Insurance Co.)

Ringler Associates Pacific, Incorporated
Ringler Associates Sacramento, Incorporated
Ringler Associates San Francisco, Incorporated
Ringler Associates Bay Area, Incorporated
Ringler Associates Incorporated dba Ringler Associates Incorporated of Delaware

Robert S. Bell
(Neither they, nor any of their parent companies, subsidiaries or affiliates, have issued any shares of stock or other equity interests to the public.)

Safeco Life Insurance Co., Inc.
(Subsidiary of Safeco Corp.)

Smith Barney, Inc.
(Subsidiary of Travelers, Inc.)

Transamerica Life Companies
(Subsidiary of Transamerica Insurance Co.)

Travelers Insurance Company
(Subsidiary of Travelers Corp.)

United of Omaha Life Insurance Company
(Subsidiary of Mutual of Omaha Insurance Company)

Western National Life Insurance Co.
(Subsidiary of Conseco Inc.)

Respondents/Defendants Ringler Insurance Agency; Ringler Associates Pacific, Incorporated; Ringler Associates Sacramento, Incorporated; Ringler Associates San Francisco, Incorporated; Ringler Associates Bay Area, Incorporated; Ringler Associates Incorporated dba Ringler Associates of Delaware; and Robert S. Bell state that neither they, nor any of their parent companies, subsidiaries or affiliates, have issued any shares of stock or other equity interests to the public.

Respondent/Defendant Metropolitan Life Insurance Company states that there are no parent companies, subsidiaries (except wholly owned subsidiaries) or affiliates that have issued any shares of stock to the public.

Respondent/Defendant Confederation Life Insurance Company states that all outstanding shares are owned by Confederation Holdings Inc.

Respondent/Defendant Alexander Hamilton Life Insurance Company is a wholly owned insurance subsidiary of Household Group Inc., which is a wholly owned subsidiary of Household Finance Corporation, which is owned by Household International.

Respondent/Defendant The Structured Settlements Company states that there are no parent companies, subsidiaries, or affiliates that have issued any shares of stock to the public.

Respondent/Defendant Safeco Life Insurance Corporation states that it is a wholly owned subsidiary of Safeco Corporation. Safeco National Life Insurance Company and First National Life Insurance Company of New York are wholly owned subsidiaries of Safeco Life. The following are less than wholly owned subsidiaries of Safeco Corporation: C-W Properties, Inc.; Valley Office and Industrial Park, Inc.; Lifeguard Ventures, Inc.; Chemical Dependency Services, Inc.; and Agena, Inc.

TABLE OF CONTENTS

	Page(s)
QUESTIONS PRESENTED	i
THE PARTIES	ii
CORPORATE DISCLOSURE STATEMENT (SUPREME COURT RULE 29.1)	ii
JURISDICTION	1
STATUTES INVOLVED	1
STATEMENT OF THE CASE	1
A. Factual Background	2
1. Annuity Policies	2
2. Annuity Funded Structured Settlements	2
3. Role of the Tort Defendant's Broker	3
4. Petitioners' Role as Tort Plaintiffs' Consultants	4
B. Proceedings Below	5
1. Petitioners' State Court Action	5
2. Federal Court Actions	6
3. The Decision of the Ninth Circuit Court of Appeals	7
C. Misstatements In the Petition	8
REASONS FOR DENYING THE WRIT	12
I.	
THE SCOPE AND APPLICATION OF THE ANTITRUST INJURY REQUIREMENT IS SETTLED	12
A. This Court's Interpretations Provide An Unambiguous Exhaustive Description Of The Antitrust Injury Requirement Of Section 4 Of The Clayton Act	12

TABLE OF CONTENTS

Page(s)

B. Lower Court Decisions Have Consistently Interpreted And Applied The Antitrust Injury Requirement 16

II.

THE DECISION BELOW IS NOT AN UNWARRANTED EXTENSION OF THE ANTITRUST INJURY DOCTRINE 18

A. The Courts Below Followed ARCO's Dictates In Evaluating Petitioners' Claims Of Antitrust Injury 18

B. The Finding Below That The Direct Victim Of A Group Boycott Did Not Sustain Antitrust Injury Does Not Present A Radical Departure From Settled Legal Principles And Will Not Pose An Insurmountable Obstacle To Future Claims By Competitors 20

III.

THERE IS NO REASON TO RECONSIDER THE SCOPE OF THE ANTITRUST INJURY DOCTRINE 21

A. In *ARCO*, The Court Considered And Rejected Petitioners' Arguments Concerning The Effect Of A Per Se Violation On The Need To Prove Antitrust Injury 21

B. There is Nothing Inherent in Group Boycott Claims that Warrants Broader Private Remedies 22

IV.

THE DECISION HERE IS FACT-SPECIFIC AND WILL NOT HAVE FAR-REACHING EFFECTS 23

TABLE OF CONTENTS

Page(s)

V.

THE LOWER COURTS' PROPER DETERMINATION NOT TO STAY OR ABSTAIN FROM EXERCISING EXCLUSIVE FEDERAL JURISDICTION OVER THE FEDERAL SHERMAN ACT CLAIM DOES NOT JUSTIFY GRANT OF CERTIORARI IN THIS CASE 24

CONCLUSION 27

TABLE OF AUTHORITIES

Federal Cases

	Page(s)
Andrea Theatres, Inc. v. Theatre Confections, Inc., 787 F.2d 59 (2d Cir. 1986)	24, 25
Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 103 S.Ct. 3201, 77 L.Ed.2d 837 (1983)	25, 26
Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985)	15
Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990)	*passim*
Balaklaw v. Lovell, 14 F.3d 793 (2d Cir. 1994)	20
Bhan v. NME Hospitals, Inc., 772 F.2d 1467 (9th Cir. 1985)	19
Blue Shield of Virginia v. McCready, 457 U.S. 465, 102 S.Ct. 2540, 73 L.Ed.2d 149 (1982)	15, 16
Brown Shoe Co. v. United States, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962)	13, 14
Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977)	13, 14, 20
California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972)	9
Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 107 S.Ct. 484, 93 L.Ed.2d 427 (1986)	14
Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976)	24, 25, 26

Table of Authorities

Federal Cases

	Page(s)
Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 47 S.Ct. 400, 71 L.Ed. 684 (1927)	15
Exhibitors Service v. American Multi-Cinema, 788 F.2d 574 (9th Cir. 1986)	19
FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 110 S.Ct. 768, 107 L.Ed.2d 851 (1990)	9
General Indus. Corp. v. Hartz Mountain Corp., 810 F.2d 795 (8th Cir. 1987)	19
Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975)	9
Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 108 S.Ct. 1133, 99 L.Ed.2d 296 (1988)	25, 26
Indiana Grocery Inc. v. Super Valu Stores, Inc., 864 F.2d 1409 (7th Cir. 1989)	17, 20, 22
Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 104 S.Ct. 1551, 80 L.Ed.2d 2 (1984)	13
Klein v. Walston & Co, 432 F.2d 936 (2d Cir. 1970)	24
Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959)	15
Les Shockley Racing v. Nat'l. Hot Rod Ass'n, 884 F.2d 504 (9th Cir. 1989)	20
Levy v. Lewis, 635 F.2d 960 (2d Cir. 1980)	24, 25
Lorentzen v. Levolor Corp., 754 F. Supp. 987 (S.D.N.Y. 1990)	25
Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)	13

TABLE OF AUTHORITIES

FEDERAL CASES

	Page(s)
McCarthy v. Madigan, 503 U.S. 140, 112 S.Ct. 1081, 117 L.Ed.2d 291 (1992)	25
McGlinchy v. Shell Chem. Co., 845 F.2d 802 (9th Cir. 1988)	16
Medema v. Medema Builders, Inc., 854 F.2d 210 (7th Cir. 1988)	24
Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)	25, 26
National Collegiate Athletic Ass'n v. Bd. of Regents, 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984)	21
O.K. Sand & Gravel v. Martin Marietta Technologies, 36 F.3d 565 (7th Cir. 1994)	16
Rutman Wine, Co. v. E. & J. Gallo Winery, 829 F.2d 729 (9th Cir. 1987)	20
SCFC ILC v. VISA USA, Inc., 36 F.3d 958 (10th Cir. 1994)	20
Silberkleit v. Kantrowitz, 713 F.2d 433 (9th Cir. 1983)	24
Stamatakis Industries Inc. v. King, 965 F.2d 469 (7th Cir. 1992)	16
Thompson v. Metropolitan Multi-list, Inc., 934 F.2d 1566 (11th Cir. 1991)	17
Turf Paradise, Inc. v. Arizona Downs, 670 F.2d 813 (9th Cir.), *cert. denied*, 456 U.S. 1011, 102 S.Ct. 2308, 73 L.Ed.2d 1308 (1982)	24, 26
U.S. v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 76 S.Ct. 994, 100 L.Ed. 1264 (1956)	18

TABLE OF AUTHORITIES

FEDERAL CASES

	Page(s)
Volmar Distribs. v. New York Post Co., Inc., 825 F. Supp. 1153 (S.D.N.Y. 1993)	20
Yellow Pages Cost Consultants, Inc. v. GTE Directories Corp., 951 F.2d 1158 (9th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1947, 118 L.Ed.2d 552 (1992)	17
Statutes	
Internal Revenue Code, 26 U.S.C. Section 104	3
Sherman Act (15 U.S.C. Section 1 *et seq.*)	6, 25
California Civil Code Section 51.5	5
California Insurance Code Section 790.3 *et seq.*	5
California Business and Professions Code Section 16700 *et seq.*	5
Section 17200 *et seq.*	5
Other	
Areeda & Hovenkamp, *Antitrust Law*, Vol. II, ¶ 362, p. 217 (Rev. ed. 1995)	14

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

LEGAL ECONOMIC EVALUATIONS, INC.;
IBAR SETTLEMENT COMPANY; and
WEIL INSURANCE AGENCY, INC.
Petitioners,

v.

METROPOLITAN LIFE INSURANCE COMPANY, et al.
Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JURISDICTION

Respondents do not dispute the description of jurisdiction set forth in the Petition.

STATUTES INVOLVED

Respondents agree with the recitation of statutes in the Petition.

STATEMENT OF THE CASE

Summary judgment was granted against Petitioners on their federal antitrust claims due to the absence of proof of antitrust injury, a requisite element imposed in all private enforcement actions by Section 4 of the Clayton Act. In decisions entirely consistent with the antitrust injury principles formulated by this Court over the last two decades, the courts below concluded that the Petitioners' asserted injuries did not flow from injury to competition in the relevant market. In so concluding, the District Court and the Court of Appeals heeded this Court's admonition in *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990) (*"ARCO"*) that a private plaintiff injured by conduct considered inherently anticompetitive in nature and thus *per se* illegal must nevertheless affirmatively show that its injuries flowed from the demonstrated anticompetitive effect of the violation on the market.

The Petition fails to present an issue worthy of this Court's attention. The decisions below did not involve resolution of important or controversial legal principles not yet addressed by this Court. Indeed, Petitioners do not seriously attempt to argue that there is a conflict between the Circuits requiring this Court's intervention. Rather, the lower courts' rulings reflect the application to the specific factual context at issue — the sale of annuity insurance policies used to facilitate settlement of disputed personal injury tort claims — of settled antitrust injury principles mandated by this Court. In any event, the lower courts' conclusion that Petitioners did not carry their burden to demonstrate that

they sustained antitrust injuries from the asserted boycott is consistent with the results reached in numerous decisions. Consequently, no question warranting review by certiorari is presented by the opinions of the lower courts.

A. Factual Background

Respondents' summary judgment motion was based upon facts not in dispute or not contested by Respondents solely for the purposes of the motion, including the relevant allegations of the Complaint.

1. Annuity Policies

An annuity policy provides specified monthly and occasional lump sum payments for a set number of years, the life of the annuitant, or a combination of the two. (Excerpts of Record[1] II:424.) Life insurance companies (the "Issuers") sell annuities at premiums derived by application of the annuitant's age to the Issuer's premium rate. The rate reflects the Issuer's prediction of its cost to provide the annuity benefits based upon its investment and underwriting policies and the quality of the company. (ER VI:1584.) The Issuer's judgment is especially significant in setting its own premiums for "rated age" annuities.[2]

2. Annuity Funded Structured Settlements

A structured settlement occurs when a personal injury plaintiff resolves a claim by accepting a promised stream of specified future periodic payments, often extending for the duration of the plaintiff's life. By accepting a structured

---

[1] All citations to Excerpts of Record (hereinafter referred to as "ER") refer to the excerpts submitted in the Ninth Circuit.

[2] A severely ill or injured annuitant may be assigned a rated age unrelated to chronological age, due to a reduced life expectancy. (ER I:40.) The Issuer must predict the extent to which life expectancy should be reduced based upon a medical consultant's evaluation of the annuitant's condition and an underwriter's analysis of survival rate statistics of similarly incapacitated individuals. (ER VI:1583-85.) The greater the age rate-up, the greater the reduction in the price of the annuity.

settlement, as opposed to obtaining a lump sum and then investing it, the plaintiff avoids income tax on the income or interest that the settlement provides. *Internal Revenue Code*, 26 U.S.C. § 104. However, this tax savings is ensured only if the structure is properly handled so that the tort plaintiff is not deemed to have constructively received a lump sum cash settlement. Thus, any annuity funding vehicle must be purchased by the tort defendant or its liability carrier (collectively referred to hereinafter as the "tort defendant").

3. Role of the Tort Defendant's Broker

Counsel for the tort defendant may retain a structured settlement expert — a broker licensed to solicit policy applications and provide premium quotes on behalf of some number of Issuers — to facilitate selection of an annuity which will achieve settlement at the least cost to the defendant. Counsel will provide the broker with the necessary information about the prospective annuitant, including the medical evaluation by the tort defendant's medical consultant for use in the Issuer's determination of the rated age and how much the tort defendant is willing to pay in settlement.[3]

The annuity broker then ascertains the annuity benefit streams offered by competing Issuers at the price the tort defendant is willing to pay in settlement by referring to the Issuer's confidential rate schedules disseminated to its appointed brokers, or in age rate-up cases, by eliciting price quotes from various Issuers based upon their respective determinations of rated age. (ER VI:1632-43.) The broker will attend settlement negotiations to explain to the tort plaintiff the precise dollar amount and benefit term of the monthly and occasional lump sum payments. (ER II:399.) Although the Issuer usually is identified in this process, the

---

[3]This sum will be a reflection of counsel's assessment of (1) the risk of losing the lawsuit, (2) the extent of the tort plaintiff's damages and (3) the tort defendant's cost of defense.

broker will not disclose to the tort plaintiff the annuity purchase price or assigned age rate-up without the tort defendant's approval. (ER VI:1619.)

Tort defendants regard non-disclosure of the annuity cost as critical to their ability to negotiate a settlement acceptable to their "adversaries," the tort plaintiff, at the least expense. (ER VI:1619.) Petitioners contend and Respondents concede for summary judgment purposes that Respondents agreed not to disclose annuity prices or rate information to tort plaintiffs or their consultants for the purpose and with the effect of reducing the cost to tort defendants of compromising personal injury claims through an annuity funded structured settlement. Respondents' alleged non-disclosure agreement is referred to as the "defense-only policy."

4. Petitioners' Role as Tort Plaintiffs' Consultants

Tort plaintiffs may retain a consultant, including Petitioners, to advise concerning the value of a structured settlement offered by the defendant as an alternative to a lump sum cash payment. The consultant can perform a present value estimation of the offer, or can critique a present value estimate provided by the defendant's broker. (ER I:36, 45-46.) Tort plaintiffs pay a fee to the consultants for these services.

At the heart of this case is Petitioners' desire to offer a service to their tort plaintiff client that Petitioners' competitor consultants cannot — to reveal the precise dollar sum to be paid by the tort defendant for a proffered annuity. According to Petitioners, the tort plaintiff can use this information to negotiate a more expensive annuity settlement.

As is undisputed, Petitioners can disclose the precise cost of an annuity offered in settlement only if Petitioners have access to the Issuers' frequently changing annuity rate schedules, and more importantly, are apprised of each Issuer's age rate-up determination in a prospective structured settlement. Petitioners thus sought to procure from the

Issuers and sell to the plaintiff the tort defendant's confidential evaluation of its adversary's injuries, life expectancy and future medical care and expenses, *i.e.* the defendant's opinions concerning the plaintiff's potential damages. (ER I:40.) It is indisputable that this revelation constitutes an involuntary detrimental disclosure of the tort defendant's confidential litigation work product to its adversary, the tort plaintiff.[4]

B. Proceedings Below

1. Petitioners' State Court Action

Petitioners' initially filed suit in California state court, alleging violations of the state antitrust laws (*California Business and Professions Code* § 16700 et seq.) and other state law claims.[5] The trial court sustained Respondents' demurrer to the antitrust claims, finding that the California Insurance Unfair Practices Act preempts antitrust enforcement actions against life insurance companies. The state Court of Appeal granted Petitioners' appeal and reversed the trial court's ruling on demurrer.[6] Thereafter, the California Supreme Court accepted Respondents' petition for review and the parties presently await oral argument.

---

[4]Petitioners advise their tort plaintiff clients to be careful in arguing for too significant an age rate-up, because it necessarily discloses the plaintiff's evaluation of its own reduced life expectancy, which then allows the defendant to argue for a reduction in damages. (ER I:40.) According to one Petitioner,"[a]s long as proper negotiation strategies are employed, counsel can successfully side-step this trap and take seemingly inconsistent positions." *Id.*

[5]Petitioners also asserted claims under the Insurance Unfair Practices Act, (*California Insurance Code* § 790.03 et seq.), the Unruh Act, (*California Civil Code* § 51.5), which prohibits discrimination in business practices, the Unfair Competition Act, (*California Business and Professions Code* § 17200 et seq.) and for tortious interference with business relationships. Appendix to the Petition For Certiorari (the "App."), p. A-36.

[6]The state Court of Appeal held that Petitioners could state claims under the Cartwright Act and the Unfair Competition Act, but not under the Unfair Insurance Practices Act. (App., p. A-35.)

2. Federal Court Actions

On September 16, 1991, after the state court antitrust claims had been dismissed, Petitioners filed complaints in the Northern District of California[7], alleging that the defense-only policy violates the Sherman Act (15 U.S.C. § 1 *et seq.*) and asserting state law claims duplicating those pending in the state court action. Respondents filed a motion for summary judgment on the Sherman Act claims on April 10, 1992, contending that Petitioners' allegations, if proven, failed to demonstrate the necessary antitrust injury to Petitioners arising from the defense-only policy. In response, Petitioners moved both ex parte and by noticed motion for a stay of the proceedings in federal court, claiming they would rather litigate in state court first, and alternatively seeking continuance of the court's ruling on the pending summary judgment motion.

The Court denied Petitioners' stay motion, finding that it lacked discretion to delay adjudication of claims within its exclusive federal jurisdiction. However, at the hearing on the motion for summary judgment, the Court granted Petitioners' request for a continuance to conduct additional discovery.

Approximately six months and countless deposition transcript pages later, the District Court ruled that Petitioners failed to show antitrust injury to themselves arising in the market Petitioners asserted was restrained by the defense-only policy — the market for settling tort litigation. (App., p. A-17.) The Court found that the demonstrated effect of the defense-only policy on tort plaintiffs was to deprive them of a negotiating advantage over their litigation adversaries, which is not an injury causally flowing from that aspect or effect of Respondents' conduct and so was not a loss the antitrust laws were designed to prevent. (App., p. A-16.)

---

[7]The Complaints filed in each of the three federal court actions are essentially identical in their allegations, and are collectively referred to hereinafter as the "Complaint."

The court reasoned that in any event, assuming Petitioners had demonstrated injury to tort plaintiffs, Petitioners are not tort plaintiffs, and cannot bootstrap tort plaintiffs' injuries to fabricate antitrust injury to themselves. (App., p. A-17.) As the Court found, "the defense only policy merely deprived [Petitioners] of an unfair advantage [they] gained over [their] competition[,]" which is not antitrust injury. (*Id.*) Finally, the court denied Petitioners' claim that antitrust injury exists implicitly in the target of *per se* prohibited conduct based upon the holding in *ARCO*. The court declined to limit application of the holding of *ARCO* to vertical price fixing claims. (App., pp. 17-18.)

Thereafter, Respondents moved for summary judgment on the remaining state law claims. The Court declined to exercise its supplemental jurisdiction and dismissed the state claims without prejudice to avoid issuing a decision on "important" and "novel" questions of the interplay of California state antitrust and insurance regulatory law, which would be "inappropriate where state court proceedings are pending in which the state court could decide the issue in the first instance." (App., pp. A-30, 31.)

3. The Decision of the Ninth Circuit Court of Appeals

The Ninth Circuit affirmed the District Court's summary judgment, holding that Petitioners had failed to link their injuries to any demonstrated harm to competition because their alleged "injury does not match either the mischief about which [they] complain[ ] or the markets in which it occurred."[8] (App., p. A-7.) The court found that any injury

---

[8] In the Complaint, Petitioners define the following relevant markets: (a) annuities sold to fund structured settlements of personal injury claims and (b) professional consulting services provided to (i) the injury victim and his/her attorney or (ii) the liability carrier regarding the use of annuities to fund structured settlement of personal injury claims.
(ER I:8).

to tort plaintiffs "arises in the market for settling litigation"[9] and the alleged injury to tort defendants from the purchase of over-priced annuities arises in the market for the sale of annuities.[10] Petitioners do not consume or compete in either of these markets and thus their losses do not flow from any demonstrated injury to competition.

The Court of Appeals also affirmed the denial of Petitioners' motion for a stay, stating:

> The District Court followed binding Ninth Circuit precedent which precludes Colorado River abstention where federal jurisdiction is exclusive nothing in that case[ ] suggests that a plaintiff may hedge its bets by filing a federal claim in federal court, placing that claim on hold and taking a shot with an analogous cause of action in state court.

(App., pp. A-10-11.)

C. Misstatements In the Petition

The Petition contains numerous contradictions and misstatements of fact. In compliance with Supreme Court Rule 15.1, Respondents note the following major misstatements in the petition:

1. Petitioners mischaracterize the tort plaintiff as "legally a 'creditor beneficiary' and — for antitrust purposes — the 'consumer' of" the annuity purchased by the tort defendant to fund a structured settlement. (Petition, p. 3.) Petitioners conceded that the tort plaintiff is merely a revocable payee of the annuity policy, and has no ownership interest in the policy. (ER I:40-41.) The consumer of the annuity — for antitrust and all other relevant purposes — is the tort defendant who buys the annuity from an Issuer.

---

[9]The Court noted that tort plaintiffs' alleged injuries "flow[ ] from what makes a structured settlement economically attractive, not from anticompetitive conduct. . . ." (App., p. A-8).

[10]The Court also acknowledged that the antitrust laws do not protect tort defendants from impractical purchasing decisions. (App., p. A-7.)

2. Petitioners attribute the following holding to the District Court:

> as a matter of law [ ] neither petitioners (as competitors in the annuity market) nor tort plaintiffs (as consumers in the annuity market) suffered 'antitrust injury' as a result of respondents' group boycott.

(Petition, p. 8.) This is a misstatement of the District Court's holding, which did not reference the "annuity market" described in the Petition, nor did it describe either tort plaintiffs as consumers of annuities or Petitioners as competitors in the annuity sales market. (App., p. A-17.)

3. Petitioners also misquote the District Court as holding that annuities used in the settlement of litigation cannot be a legally cognizable market subject to the antitrust laws. (Petition, pp. 8-9.) The Court made no such ruling,[11] but instead concluded that tort plaintiffs do not suffer a cogniza-

---

[11] In any event, this Court has never held that the antitrust laws apply to the conduct of adversaries in litigating and settling disputed claims, particularly to realign the relative negotiating postures of the litigants. The decisions cited by Petitioners do not apply the antitrust laws "to restraint which subverted the litigation process" as Petitioners contend. In *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 110 S.Ct. 768, 107 L.Ed.2d 851 (1990), the Court concluded that a boycott by court-appointed attorneys in the District of Columbia intended to secure higher rates of compensation from the District for their services was a *per se* price fixing conspiracy. The case did not implicate antitrust regulation of the adversarial system, only the traditional business practices of attorneys. *In California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11, 92 S.Ct. 609, 611-12, 30 L.Ed.2d 642 (1972), the Court extended the immunity from antitrust regulation to concerted activities undertaken through litigation and administrative actions even if it injures other market participants, unless the activities are merely a sham devoid of any merit. The decision did not even suggest application of the antitrust laws to the actual process of litigation or the relationship between litigants. In *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787-88, 95 S.Ct. 2004, 2013, 44 L.Ed.2d 572 (1975), a prospective client seeking legal advice alleged a price-fixing conspiracy arising from compliance with a minimum fee schedule for services by members of the local bar association.

ble injury if deprived of a negotiating advantage over their litigation adversaries. (App., pp. A-8, 9.)[12]

4. Petitioners further distort the rulings in the courts below by the asserting that the opinion rested on the holding that Petitioners asserted:

> harm was not cognizable under the antitrust laws because it occurred in the course of settling tort litigation and the supply of goods or services to facilitate court settlements is not "commerce" subject to the antitrust laws.

(Petition, p. 18.) This is yet another mischaracterization of the District Court's determination that tort plaintiffs did not suffer an antitrust injury remedied by the antitrust laws. (App., p. A-16.) More importantly, the characterization runs afoul of the explicit holding of the Court of Appeals:

> to the extent that tort plaintiffs are harmed, that harm arises in the market for settling tort litigation.

5. Petitioners contend that the lower courts erroneously ruled that, as a matter of law, "petitioners did not compete in the market from which Respondents admit Petitioners were excluded." (Petition, p. 16.) To the contrary, the courts held that Petitioners lack antitrust injury in this market because they failed to show an anticompetitive effect to the market as a consequence of Petitioners exclusion as competitors.

---

[12] Petitioners complain that the Ninth Circuit declined to reach the lower court's erroneous ruling that annuity funded structured settlements of tort litigation do not constitute a legally cognizable market for antitrust purposes. However, the Ninth Circuit could never "reach" this ruling, because it did not issue from the District Court as described herein. The Ninth Circuit did state:

> Because we concluded that Weil has failed to show that its losses flow from injury to competition in the relevant market, we do not reach Life Carrier and Brokers' alternative theories having to do with aspects of the legal process which they offer in support of the district court's judgment.

(App., p. A-9.)

6. Petitioners argue that the District Court ruling depends upon its erroneous finding that annuity prices are protected as "attorney work product." To the contrary, the District Court's conclusion was premised upon its finding that Petitioners were not injured by anticompetitive acts in any market in which Petitioners participated without regard to whether the cost of a proffered settlement annuity is privileged.[13]

7. Petitioners misstate the lower courts' ruling and their precedential effect by asserting that the courts held that the existence of antitrust injury to consumers in the market as a matter of law precludes antitrust injury to competitors in the same market, the inevitable consequence of which is a complete foreclosure of antitrust relief available to competitors for violations that also injure consumers. (Petition, p. 16.) There is no merit to Petitioners' mischaracterization of the courts' rulings, which in fact were predicated precisely upon a lack of injury to consumers in any market in which Petitioners sustained injury. (App., p. A-7.)

8. Petitioners misstate applicable legal authorities and suggest a non-existent conflict among the circuits in their effort to demonstrate that the lower courts erroneously failed to abstain from adjudication of federal claims within the district court's exclusive federal jurisdiction required by the presence of questions of state policy. (Petition, p. 20.) In any event, the propriety of the court's refusal to abstain is

---

[13] With regard to the applicability of the attorney work product doctrine, the Court stated:

> The price quotations given by the life insurance providers to the tort defendants are based on the defendants' evaluation of the tort plaintiff's expected life span, which is often based on the defendants' confidential evaluation of the plaintiff's injuries. This is clearly protected work product.

(App., p. A-16, n.2.) Thus, the court found that revealing the cost of a rated age annuity would necessarily reveal the tort defendants' damage evaluation through a simple reverse engineering process. The Court did not find that annuity prices in a vacuum constituted protected work product.

irrelevant to the substantive legal issue of the lack of antitrust injury dispositive of the federal court claims.

REASONS FOR DENYING THE WRIT

The Petition offers no reasonable basis for review of the lower courts' decisions. No unresolved question of great legal significance is presented by the decisions below. The lower courts scrupulously adhered to well-settled principles defined by this Court in determining that Petitioners failed to satisfy their antitrust injury burden and the lower courts' findings turned upon the unique facts presented. Contrary to Petitioners' arguments, the courts' holdings will not increase the showing necessary to satisfy antitrust injury by competitors excluded from the market as a result of a group boycott.

Put simply, Petitioners seek review of the decisions below to secure an opportunity to persuade this Court to eliminate antitrust injury as a condition to private enforcement for *per se* antitrust violations. This Court expressly considered and rejected this argument in *ARCO* and there is no reason arising from the decisions below to revisit this issue. There is no conflict among the Circuits in decisions applying antitrust injury and no conflict is presented by the decisions below. Consequently, review of the decisions below affords no opportunity for clarification by this Court of antitrust injury principles.

I.

THE SCOPE AND APPLICATION OF THE ANTITRUST INJURY REQUIREMENT IS SETTLED

A. This Court's Interpretations Provide An Unambiguous Exhaustive Description Of The Antitrust Injury Requirement Of Section 4 Of The Clayton Act

In an effort to create a reviewable issue, Petitioners mischaracterize the antitrust injury requirement as an "ambiguous doctrine" that has been applied inconsistently by this Court. (Petition, p. 13.) To the contrary, the antitrust injury analysis utilized by the Court of Appeals here reflected the consistently defined principles first enunciated by

this Court in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977). In *Brunswick*, this Court announced that an antitrust plaintiff must establish:

> [I]njury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful ....

Id. at 489, 97 S.Ct at 697, 50 L.Ed.2d at 701. This requirement underscores the fundamental tenet that "[t]he antitrust laws ... were enacted for the 'protection of *competition*, not *competitors*.'" *Id.* at 488, 97 S.Ct. at 697, 50 L.Ed.2d at 701, quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 82 S.Ct. 1502, 1521, 8 L.Ed.2d 510 (1962) (emphasis in original).

In *Brunswick*, this Court declined to extend antitrust remedies to injuries for violations which did not injure competition and consumers. The plaintiff sought to recover profits it would have received had its competitors withdrawn from the market which it did not realize due to their continued participation in the market following an illegal merger. Although the merger violated the Clayton Act due to the resulting decrease in the number of competitors in the already highly concentrated market, no anticompetitive effect upon consumers was presumed.

In subsequent decisions, the Supreme Court further defined the showing required to demonstrate antitrust injury. In *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 31, 104 S.Ct. 1551, 1568, 80 L.Ed.2d 2 (1984), the Court extended the reasoning of *Brunswick* to actions pursuing remedies for violations of the Sherman Act. Similarly, in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582, 106 S.Ct 1348, 1354, 89 L.Ed.2d 538 (1986), this Court extended the reasoning of *Brunswick* to competitors' suits for price fixing, holding that a competitor may not:

> recover damages for any conspiracy ... to charge higher than competitive prices.... Such conduct would violate the Sherman Act, but it could not injure respon-

dents: as petitioner's competitors, respondents stand to gain from any conspiracy to raise the market price.

The need to demonstrate injuries linked to harm to competition to pursue injunctive relief was confirmed in *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 109-10, 107 S.Ct. 484, 93 L.Ed.2d 427 (1986). Thus, as early as 1986, the antitrust injury doctrine had been defined consistently by this Court to limit the availability of private enforcement actions by competitors to those claims seeking losses by a competitor caused by antitrust violations that also cause related injuries to competition.

Any doubt concerning the effect and intent of the antitrust injury principles was resolved in *ARCO*, in which this Court expressly confirmed the need to show antitrust injury in *every* private enforcement action, including those alleging a *per se* violation.[14] This Court also clarified the required showing by explaining that the claimed loss must stem from an anticompetitive effect or aspect of the alleged violation. *ARCO*, 495 U.S. at 334, 110 S.Ct. at 1889, 109 L.Ed.2d at 333. Applying this analysis, the Court found that defendants' *per se* prohibited agreements fixing maximum prices did not cause antitrust injuries to competitors due to the lack of anticompetitive effect on consumers in the market. *Id.* This holding comports precisely with earlier statements by this Court that the antitrust laws were intended to protect competition, not competitors. *See e.g., Brown Shoe*, 370 U.S. at 320, 82 S.Ct. at 1521, 8 L.Ed 2d at 570.[15]

---

[14] *See e.g.*, Areeda & Hovenkamp, *Antitrust Law*, Vol. II, ¶ 362, p. 217 (Rev. ed. 1995), "The Supreme Court settled the issue in *ARCO*, which rejected a presumption of antitrust injury in *per se* cases and required the private plaintiff to prove antitrust injury in *every* case" (Emphasis added).

[15] Petitioners have not shown a conflict between the ruling in *ARCO* and the rationales expressed in other decisions of this Court involving claims by competitors for losses due to exclusionary conduct. The decisions referenced by Petitioners (Petition, p. 15) all predate this Court's conclusive discussion of antitrust injury in *ARCO*, and two of the

This Court's decision in *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 102 S.Ct. 2540, 73 L.Ed.2d 149 (1982) does not conflict with the holding of *ARCO*. In *McCready*, the plaintiff, a consumer of psychotherapy services, alleged injuries flowing from a conspiracy between the defendant health insurance plan and psychiatrists to refuse reimbursement to members for services provided by psychologists. The plaintiff, a consumer in the market in which the anticompetitive effect of the conspiracy occurred, sustained losses consisting of increased cost of psychotherapy services of the boycotted psychologist or a loss of choice of available suppliers for whom reimbursement was provided. These losses were the direct consequence of the conspiracy and flowed from the anticompetitive effect of the boycott.[16]

---

three predate the pronouncement of antitrust injury in *Brunswick*. *See e.g. Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985); *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 47 S.Ct. 400, 71 L.Ed. 684 (1927). Additionally, the rationale expressed in *Aspen*, the only decision cited that postdates *Brunswick's* demand for antitrust injury in private actions, is entirely consistent with the established principles announced in *ARCO*. In evaluating the plaintiff's claim of an attempt to monopolize the market by its competitor the Court stated:

> The question whether SkiCo's conduct may properly be characterized as exclusionary cannot be answered by simply considering its effect on Highlands. In addition it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way.

Aspen, 472 U.S. at 605, 105 S.Ct. at 2858-59, 86 L.Ed.2d at 467. Moreover, the *Aspen* decision is not a group boycott action, as Petitioners contend, but an attempted monopolization claim under Section 2 of the Sherman Act.

[16]Petitioners' claim that they have shown antitrust injury to themselves due to a demonstrated anticompetitive effect on tort plaintiffs who are deprived of a negotiating advantage by the defense-only policy is not supported by the decision in *McCready*. First, McCready's injuries occurred in the same market as the harm to psychologists. Petitioners

McCready certainly does not stand for the general proposition that competitors affected by an allegedly anticompetitive practice *ipso facto* have sustained antitrust injury.[17]

B. Lower Court Decisions Have Consistently Interpreted And Applied The Antitrust Injury Requirement

Petitioners assert that lower courts are hampered in their application of the antitrust injury requirements by unsettled questions of its extent and application. They offer in support of their assertion three cases purportedly involving similar

---

here failed to demonstrate losses in any market in which competition was injured. As the Ninth Circuit noted:

> Because the *McCready* plaintiff was a *consumer* in the market for psychotherapy services, the ultimate harm from the conspiracy would be borne by her either directly (by having to pay more for those services) or indirectly (by having fewer options). In either event the harm would have been borne in the *same* market (for psychotherapy services).

(App., p. A-9) (emphasis in original). Moreover, Petitioners misstate the holding of *McCready* as allowing a competitor to sue if its injury was "inextricably intertwined" with defendants' violation. However, the referenced quotation in *McCready* speaks not of injury intertwined with the defendants' violation, but rather of the harms sustained by the plaintiff and the boycotted psychologists.

[17] In *O.K. Sand & Gravel v. Martin Marietta Technologies*, 36 F.3d 565 (7th Cir. 1994), the court found competitors do not suffer antitrust injury for lost profits resulting from an antitrust violation which in effect increases prices or restricts output to consumers. In *Stamatakis Industries Inc. v. King*, 965 F.2d 469, 471 (7th Cir. 1992), the court easily disposed of the claims of a competitor arising from an antitrust violation limited in its anticompetitive effect solely to the injured plaintiff. The court stated that antitrust injury "required every plaintiff to show that its loss comes from acts that reduce output or raise prices to consumers' . . . the antitrust laws [ ] protect consumers from suppliers, rather than suppliers from each other." *Id.* The Ninth Circuit recognized the lack of antitrust injury to competitors excluded from the market by prohibited conduct even before the *ARCO* opinion issued. *See e.g., McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 812 (9th Cir. 1988) (it is injury to the market or to competition in general, not merely injury to individuals or individual firms that is significant).

claims of losses by competitors excluded from the market with inconsistent results concerning the showing of antitrust injury. However, the reasoning and required showing of antitrust injury in each of these decisions is entirely consistent.[18]

---

[18] In *Yellow Pages Cost Consultants, Inc. v GTE Directories Corp.*, 951 F.2d 1158 (9th Cir.), *cert. denied*, ____ U.S. ____, 112 S.Ct. 1947, 118 L.Ed.2d 552 (1992), the Ninth Circuit concluded that a competitor sustained antitrust injuries for losses arising from a refusal to deal by its competitor. Yellow Pages sold advice to purchasers of advertising space in GTE's phone book on how to reduce the cost of the ads it purchased from GTE and it also placed ads with GTE on behalf of its customers. GTE withdrew its practice of allowing Yellow Pages to place orders, restricting Yellow Pages' business. The disputed issue before the Court was not application of the antitrust injury principles, but the preliminary determination of the relevant product market. Upon finding that the parties did compete in the market for sales of advertising services, the Court found antitrust injury existed. However, the antitrust injury determination did not arise merely because Yellow Pages was injured as an excluded competitor, but instead because the challenged practice also caused harm to consumers — purchasers of advertising space — in the restrained market. *Id.* at 1162.

Petitioners also misstate the ruling and import of the decision in *Thompson v. Metropolitan Multi-list, Inc.*, 934 F.2d 1566 (11th Cir. 1991), as a suit by a competitor denied access to the market by a boycott of other market participants. To the contrary, the plaintiff in *Thompson* satisfied the antitrust injury requirement precisely because his alleged loss as a consumer flowed directly from the anticompetitive effect of the alleged violation — an increase in the prices of the products he purchased from the defendant.

Finally, the decision in *Indiana Grocery Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1419-20 (7th Cir. 1989), which predates the *ARCO* decision, arises from application of the identical principles controlling the decisions in *Yellow Pages* and *Thompson*. The absence of any anticompetitive effect inuring to the market, as opposed merely to the victim of the antitrust violation, mandated the court's conclusion that antitrust injury was lacking.

II.

THE DECISION BELOW IS NOT AN UNWARRANTED EXTENSION OF THE ANTITRUST INJURY DOCTRINE

A. The Courts Below Followed *ARCO's* Dictates In Evaluating Petitioners' Claims Of Antitrust Injury

The lower courts conducted the requisite market examination to determine if Petitioners satisfied the antitrust injury requirement. As instructed by this Court, the courts below carefully scrutinized the anticompetitive effects alleged to discern any causal link to the purported losses to Petitioners. The crux of the lower courts' decisions rested upon their finding that the Petitioners' losses arose in a market distinct from the markets in which anticompetitive effects occurred. The lower courts' requirement is not a departure from the principles established by this Court. As stated in *ARCO*:

> the antitrust injury requirement cannot be met by broad allegations of harm to the 'market' as an abstract entity. Although all antitrust violations, under both the per se rule and rule of reason analysis, 'distort' the market, not every loss stemming from a violation counts as antitrust injury.

496 U.S. at 340 n.8, 110 S.Ct. at 1892 n.8, 109 L.Ed.2d at 333.

As the District Court and the Ninth Circuit correctly noted here, Petitioners have not carried their burden of coming forward with evidence of antitrust injury within any of the markets that Petitioners have defined. Instead, Petitioners have attempted to camouflage their lack of injury by creating a hodgepodge market, an amalgamation of the product markets alleged in the Complaint. Petitioners are not at liberty to craft a market definition at whim, but are limited by economic realities. *U.S. v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404, 76 S.Ct. 994 1012, 100

L.Ed. 1264 (1956); *Bhan v. NME Hospitals, Inc.*, 772 F.2d 1467, 1470-71 (9th Cir. 1985).

As the courts below aptly noted, Petitioners' loss — inability to compete in the market for consulting services to tort defendants — does not arise in either the market for settling tort litigation or in the market for the purchase and sale of annuities, the only two markets in which an anticompetitive effect is asserted.[19] Petitioners asserted that the purpose and effect of the defense-only policy, the alleged group boycott, was to withhold annuity price information from tort plaintiffs and Petitioners, who advise tort plaintiffs concerning annuity funded settlements. Petitioners charged that the boycott caused an anticompetitive effect on tort plaintiffs, who could demand settlement annuities providing greater benefits at increased cost to the tort defendants if armed with annuity price information. Petitioners also contended that anticompetitive effect flowed to tort defendants, who purportedly purchased overpriced annuities for use in these settlements.

Petitioners, consultants to tort plaintiffs concerning the value and benefits of a proffered structured settlement, are not injured by Respondents' refusal to disclose the annuity cost to tort plaintiffs. The courts below properly recognized that Petitioners are able to compete unhampered in the market for tort plaintiffs consulting services, and thus have not suffered an injury flowing from a reduction in competition in any market in which they participate.

---

[19] Petitioners, which are neither consumers nor competitors in the annuity sale market, unquestionably lack standing to bring an antitrust claim regarding injuries to competition arising there. *See e.g., Exhibitors Service v. American Multi-Cinema*, 788 F.2d 574, 578-79 (9th Cir. 1986) (injured licensing agent lacks standing where neither competitor of defendants nor consumer); *General Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 809 (8th Cir. 1987) (broker of terminated distributor lacked standing against manufacturer in boycott case since distributor was neither consumer nor competitor in relevant market).

B. The Finding Below That The Direct Victim Of A Group Boycott Did Not Sustain Antitrust Injury Does Not Present A Radical Departure From Settled Legal Principles And Will Not Pose An Insurmountable Obstacle To Future Claims By Competitors

Petitioners assert that the lower courts' denial of antitrust remedies for their exclusion as competitors caused by an admitted group boycott is inexplicable and a "perversion" of the principles announced in *ARCO*. (Petition, p. 14.) The decisions below are characterized by Petitioners as insurmountable barriers to private remedies due to the purported holdings that as a matter of law a competitor eliminated from a market by exclusionary conduct does not sustain injuries linked to any anticompetitive effect in the market.

Petitioners' depiction of the decisions below is erroneous. The lower courts' holdings merely require competitors to show injury to themselves and competition occurring in the same market. This is the precise standard imposed upon all private plaintiffs under *Brunswick* and *ARCO*.

Indeed, numerous reported decisions have also found that the, intended victim of a group boycott failed to satisfy the antitrust injury requirement. *See e.g. Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1415 (7th Cir. 1989); *Les Shockley Racing Inc. v. Nat'l. Hot Rod Ass'n*, 884 F.2d 504, 508 (9th Cir. 1989); *Balaklaw v. Lovell*, 14 F.3d 793 (2nd Cir. 1994); *Rutman Wine, Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 735-36 (9th Cir. 1987); *SCFC ILC v. VISA USA, Inc.*, 36 F.3d 958, 967 (10th Cir. 1994); *Volmar Distribs. v. New York Post Co.*, 825 F.Supp. 1153, 1161 n.5 (S.D.N.Y. 1993).

III.

THERE IS NO REASON TO RECONSIDER THE SCOPE OF THE ANTITRUST INJURY DOCTRINE

A. In *ARCO*, The Court Considered And Rejected Petitioners' Arguments Concerning The Effect Of A Per Se Violation On The Need To Prove Antitrust Injury.

In *ARCO*, this Court mandated the need for proof of antitrust injury in every private enforcement action, even in cases of a horizontal price fixing conspiracy, the "paradigm unreasonable restraint." 495 U.S. at 344, 110 S.Ct. at 1893-94, citing *National Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 100, 104 S.Ct. 2948, 2959, 82 L.Ed.2d 70 (1984). As this Court stated:

> The antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior. The need for this showing is at least as great under the per se rule as under the rule of reason.

ARCO, 495 U.S. at 344, 110 S.Ct. at 1893-94, 109 L.Ed.2d at 333.

Despite the unequivocal statement of this Court that proof of a substantive violation is insufficient to show antitrust injury, Petitioners nonetheless assert that the lower courts' adherence to this rule is a basis for review here. They contend that their injuries — elimination as market competitors — is the precise harm to competition that the antitrust laws seek to prevent in prohibiting boycotts and refusals to deal and thus antitrust injury is satisfied. Petitioners extrapolate from the presumption of anticompetitive effect relevant to liability that an excluded competitor necessarily suffers injuries from a reduction in competition. (Petition, p. 12.) Petitioners' circuitous reasoning was considered and dismissed in *ARCO* with the Court's statement that mere proof of a *per se* violation was not a substitute for satisfaction of the antitrust injury requirement. *ARCO*, 495 U.S. at 343, 110 S.Ct. at 1894, 109 L.Ed.2d at 333.

B. There is Nothing Inherent in Group Boycott Claims that Warrants Broader Private Remedies

Petitioners assert that the antitrust injury analysis of the decisions below is clearly erroneous as demonstrated by the inexplicable finding that Petitioners may not pursue antitrust remedies. Petitioners request in essence that this Court carve out an exception from the antitrust injury requirement to allow competitors injured by a group boycott to pursue antitrust remedies. However, the decisions below present no basis for this Court to redefine the antitrust injury principles for claims involving group boycotts.

In the face of Respondents' demonstration that no injury to competition arises in a market in which Petitioners compete, Petitioners respond with an irrelevant question — if the direct victim of a group boycott does not sustain antitrust injury, who does? (Petition, p. 16.) The *ARCO* decision provides an obvious answer to Petitioners' query as to who sustains antitrust injury. The direct victim of a group boycott does indeed sustain antitrust injury if the restriction on competition flowing from the boycott extends beyond the excluded competitor to cause injury to consumers in the market, through increased prices, decreased output, or other restrictions on the market. Thus, the Court has required the independent showing of antitrust injury to distinguish injuries to competition from injuries to competitors.[20]

---

[20]Petitioners' view that they necessarily sustained antitrust injury as victims of a *per se* violation was discredited in *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409 (7th Cir. 1989). The Seventh Circuit explained:

> It is tempting when performing an antitrust injury analysis to look first at the substantive antitrust provision the defendant has allegedly violated, to note next the harmful effects on competition the substantive provision is designed to prevent, to note further that some of those harmful effects might fall on parties such as the plaintiff, and to conclude, therefore, that the plaintiff should have standing to vindicate the substantive antitrust provision the defendant allegedly has violated .... [This] approach[ ] stand[s] the antitrust injury inquiry on its head.

Id. at 1419, n.6.

In any event, the factual circumstances presented in the Petition certainly do not militate in favor of a presumption of antitrust injury if a *per se* group boycott is alleged. In this instance, Petitioners could not construct an antitrust injury out of the admitted allegations of the Complaint, precisely because the harm of which they complain — the inability to sell the tort defendants' negotiating strategy to its ligation adversary — is not a harm of concern to the antitrust laws.

IV.

THE DECISION HERE IS FACT-SPECIFIC AND WILL NOT HAVE FAR-REACHING EFFECTS

The decisions below turned on the unique facts of the structured settlement annuity industry, including the peculiar process by which settlements are negotiated between adversaries in tort litigation. The decisions below will not operate to bar all competitor-initiated group boycott suits, as Petitioners contend. Rather, the opinions promote the principles enunciated in *ARCO* and its forbears that the antitrust laws protect competition, not competitors, by limiting the availability of enforcement actions to claims by competitors injured by conduct which restricts competition in the market. Petitioners effectively concede that the rulings of the lower courts were an appropriate application of the mandates announced by this Court in *ARCO*, by their argument in the Petition that *ARCO* itself departed from the settled principles of this Court concerning the availability of private enforcement actions, thereby requiring reconsideration by this Court.

V.

THE LOWER COURTS' PROPER DETERMINATION NOT TO STAY OR ABSTAIN FROM EXERCISING EXCLUSIVE FEDERAL JURISDICTION OVER THE FEDERAL SHERMAN ACT CLAIM DOES NOT JUSTIFY GRANT OF CERTIORARI IN THIS CASE

Petitioners' assertion that this Court should grant certiorari because the lower courts improperly refused to stay or abstain from exercising "exclusive" federal jurisdiction over the Sherman Act claims under the "wise judicial administration" doctrine articulated in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), does not justify grant of certiorari. Petitioners' attempt to avoid the consequences of having "forum shopped" among the state and federal courts does not implicate substantial concerns justifying this Court's intervention.

Contrary to Petitioners' characterization, there is no conflict in the Circuits concerning the district court's refusal to stay or abstain proceedings over which it had "exclusive federal jurisdiction." Petitioners' suggestion that the Ninth Circuit's decision in this context is "contrary to many courts in other Circuits" (*see e.g.*, Petition, p. 21) is specious at best. While this Court has not finally resolved the issue of applicability of *Colorado River* abstention to cases involving exclusive federal jurisdiction, the Circuit Courts have uniformly held that a district court has no discretion to stay or abstain where it was exclusive federal jurisdiction. *See Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813 (9th Cir.), *cert. denied*, 456 U.S. 1011, 102 S.Ct. 2308, 73 L.Ed.2d 1308 (1982); *Silberkleit v. Kantrowitz*, 713 F.2d 433 (9th Cir. 1983); *Medema v. Medema Builders, Inc.*, 854 F.2d 210 (7th Cir. 1988); *Levy v. Lewis*, 635 F.2d 960 (2d Cir. 1980); *Andrea Theatres, Inc. v. Theatre Confections, Inc.*, 787 F.2d 59 (2d Cir. 1986). Moreover, Petitioners' reliance on *Klein v. Walston & Co*, 432 F.2d 936 (2d Cir. 1970) and

Lorentzen v Levolor Corp., 754 F.Supp. 987 (S.D.N.Y. 1990) is particularly dubious because both decisions are contrary to binding precedent in the Second Circuit. *See Levy v. Lewis*, 635 F.2d at 967; *Andrea Theatres, Inc.*, 787 F.2d at 62-63. Similarly, Petitioners' reliance on a single district court opinion and a First Circuit opinion decided prior to this Court's opinions in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983), *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 103 S.Ct. 3201, 77 L.Ed.2d 837 (1983), and *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 108 S.Ct. 1133, 99 L.Ed.2d 296 (1988) and consideration by the other Circuit Courts is not persuasive.

Petitioners' assertion also disregards this Court's repeated and consistent observation that abstention from the exercise of federal jurisdiction is the exception, not the rule, because of "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them."[21] Petitioners' attempt to invoke U.S. Supreme Court Rule 10.1(c) to have this Court decide whether a district court may stay or abstain proceedings in which it has "exclusive federal jurisdiction" betrays not only a misunderstanding of *Colorado River* abstention requirements, but also disregards the fact that a stay in the federal action in this case would not have affected the determination that Petitioners suffered no "antitrust injury" within the meaning of the federal antitrust law. While ignored by Petitioners, the "wise judicial administration" exception to the exercise of federal jurisdiction is invoked only where both the federal and state courts have concurrent jurisdiction over particular claims. There is no

---

[21] *Colorado River*, 424 U.S. at 817, 96 S.Ct. at 1246, 47 L.Ed.2d at 483 (1976); *Moses H. Cone Memorial Hospital*, 460 U.S. at 15-16, 103 S.Ct. at 936, 74 L.Ed.2d at 765; *San Carlos Apache Tribe*, 463 U.S. at 552, 103 S.Ct. at 3206 77 L.Ed.2d at 837; *Gulfstream Aerospace Corp.*, 485 U.S. at 273, 108 S.Ct. at 1135, 99 L.Ed.2d at 296; *McCarthy v. Madigan*, 503 U.S. 140, 112 S.Ct. 1081, 117 L.Ed.2d 291 (1992).

concurrent jurisdiction over the federal antitrust claims. *See* 15 U.S.C. § 15; *Turf Paradise, Inc.*, 670 F.2d at 821.

As this Court stated in *Moses H. Cone*, a stay or dismissal of the federal action is precluded where there exists a "substantial doubt" as to whether the state proceedings will resolve the federal action. *Moses H. Cone*, 460 U.S. at 28, 103 S.Ct. at 943, 74 L.Ed.2d at 765. Similarly, in *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 108 S.Ct. 1133, 99 L.Ed.2d 296 (1988), the Court reiterated that a stay order is only proper where the district court has "full confidence" that the state action will end the federal litigation. *Id.* at 277, 108 S.Ct. at 1137, 99 L.Ed.2d at 296; *see also San Carlos Apache Tribe*, 463 U.S. at 560, 103 S.Ct. at 3210, 77 L.Ed.2d at 837 (stay improper where state court cannot resolve federal claims).

In this case, as there is no concurrent jurisdiction over the federal antitrust claims, there is no question that the state action *cannot* resolve the federal action. Although Petitioners pursued state law antitrust causes of action in state court, that court has *no* jurisdiction or power to decide the *federal* antitrust claims brought under the Sherman Act. Even had the federal court stayed the Sherman Act claims, Petitioners still would have had to return to federal court where the district court would correctly decide that they suffered no "antitrust injury" as required by federal antitrust law. Under such circumstances, the "efficiency concerns" that lie at the heart of *Colorado River* abstention do not exist here and are directly contrary to Congress' grant of exclusive federal jurisdiction to the federal courts. Additionally, given that the state decision could not be accorded preclusive effect in the federal action, *Colorado River's* concern about avoiding "piecemeal litigation" cannot possibly be furthered by stay or dismissal.

Petitioners' thinly disguised effort to preserve their "forum shopping" does not justify grant of certiorari. Petitioners, not Respondents, decided to file suit in *federal* court seeking adjudication of their *federal* antitrust claims. There-

fore, Petitioners filed suit in federal court upon penalty of having the federal court do precisely what Petitioners sought, *i.e.*, adjudicate their *federal* antitrust claims. Having failed to dismiss the federal claims prior to adjudication and having lost on the merits, Petitioners cannot invoke certiorari under the guise of U.S. Supreme Court Rule 10.1(c) to preserve their right to have the state claims adjudicated first before the federal court considered the exclusively federal antitrust claims. Accordingly, this Court should deny grant of certiorari in this case.

CONCLUSION

There is no issue presented in the decisions below worthy of review by this Court. The Petition for certiorari should be denied.

Respectfully submitted,

ROBERT M. MITCHELL
PETER E. ROMO, JR.
LUANNE SACKS
(Counsel Of Record)
DARREN S. WEINGARD
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
101 California Street, Suite 2900
San Francisco, CA 94111
Telephone: (415) 397-2823

Attorneys for Respondent
The Prudential Insurance Company Of America

MARK LEHOCKY, ESQ.
ROBERT VERBER, ESQ.
WELD, FREELAND, COOPER & LEHOCKY
150 Spear Street, Suite 1800
San Francisco, CA 94105
Telephone: (415) 541-0200

Attorney for Respondent
Metropolitan Life Insurance Company

H. JOSEPH ESCHER, III, ESQ.
HOWARD, RICE, NEMEROVSKI, CANADY,
ROBERTSON & FALK
Three Embarcadero Center, 7th Floor
San Francisco, CA 94111
Telephone: (415) 434-1600

Attorneys for Respondent
Safeco Life Insurance Company

ELROY H. WOLFF, ESQ.
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
Telephone: (202) 736-8000

Attorneys for Respondent
National Structured Settlement Trade Association

HARRY W.R. CHAMBERLAIN, II, ESQ.
JOHN C. CEDERBERG, ESQ.
JOHN HUNTER, ESQ.
MUSICK, PEELER & GARRETT
624 South Grand Avenue, 22nd Floor
Los Angeles, CA 90017
Telephone: (213) 629-7600

Attorneys for Respondent
The Structured Settlements Company

DALE E. FREDERICKS, ESQ.
DARRYL M. WOO, ESQ.
SHEPPARD, MULLIN, RICHTER & HAMPTON
Four Embarcadero Center, 17th Floor
San Francisco, CA 94111
Telephone: (415) 434-4914

Attorneys for Respondents
Ringler Insurance Agency et al. and Robert S. Bell

DAVID SHANE, ESQ.
ADAMS, DUQUE & HAZELTINE
500 Washington Street, 6th Floor
San Francisco, CA 94111
Telephone: (415) 982-1240

Attorneys for Respondents
Alexander Hamilton Life Insurance Company of America and Confederation Life Insurance Company

MOTION FILED
MAR 6 1995

No. 94-1328

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

LEGAL ECONOMIC EVALUATIONS, INC.;
IBAR SETTLEMENT COMPANY; and
WEIL INSURANCE AGENCY, INC.
Petitioners,
VS.
METROPOLITAN LIFE INSURANCE COMPANY, et al.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF CONSUMER FEDERATION OF AMERICA'S INSURANCE GROUP IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

HOWARD M. METZENBAUM
United States Senator (Ret.)
Chairman of the Consumer
Federation of America
(Counsel of Record)
KATHLEEN F. O'REILLY
414 "A" STREET, S.E.
Washington, D.C. 20003
Telephone: (202) 543-5068
Attorneys for *Amicus Curiae*
Consumer Federation of
America's Insurance Group

BEST AVAILABLE COPY

24 pp

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

Consumer Federation of America's ("CFA") Insurance Group hereby respectfully moves for leave to file the attached brief as *amicus curiae* in support of a writ of *certiorari* with respect to the first question presented for review by the petition. Pursuant to United States Supreme Court Rule 37.2, CFA's Insurance Group requested the parties' consent to its participation in this matter. Petitioners granted permission; respondents refused.

Founded in 1968 to advance the consumer interest, Consumer Federation of America ("CFA") is a nonprofit association of more than 240 national, state and local organizations with a combined membership of 50 million Americans. The Chairman of CFA is Senator Howard M. Metzenbaum, retired member of the United States Senate and former Chair of the Antitrust, Monopolies & Business Rights subcommittee of the Senate Judiciary Committee.

A nonprofit organization, the National Insurance Consumer Organization ("NICO") was founded in 1980 as the only national consumer organization exclusively devoted to analyzing and advancing various insurance issues as they affect the consumer. Both CFA and NICO have provided consumer education on insurance issues and have advocated the interest of consumers of insurance in the development of public policy before regulatory and legislative bodies and the courts.

In January of 1995, NICO merged with CFA and is now known as CFA's Insurance Group. The CFA Insurance Group's director is J. Robert Hunter, an actuary as well as the founder and former president of NICO. Mr. Hunter recently served as Insurance Administrator of the State of Texas and formerly served as Federal Insurance Administrator under Presidents Ford and Carter. Both CFA and

NICO have, over the years, received numerous complaints from consumers about insurance industry practices.

As discussed herein, consumers of annuities sold by insurance companies to fund the settlement of personal injury litigation—i.e., those people who receive annuity payouts, authorize the purchase of annuities and relinquish their personal injury claims in exchange for annuities—will continue to be denied access to information about annuity prices unless *certiorari* is granted and the Court of Appeals' decision is reversed. The insurance industry's admitted conspiracy to exclude petitioners from the market in order to prevent insurance consumers from properly evaluating the most fundamental aspect of any product — its price — is unjustifiable. Further, the efficient allocation of insurance funds for the benefit of consumers who are often severely injured and rely upon annuity payouts to provide basic health care products and services is thwarted by the insurance industry's agreement to withhold price information from the public.

Moreover, competitors (such as petitioners) were providing price information to consumers and therefore were also providing better value and increasing the volume of annuity products consumers desired. If they may be excluded from the market by a nationwide agreement of their direct suppliers and competitors, consumers will suffer greatly. Here, and in many other circumstances, consumers are unaware of the anticompetitive and anticonsumer practices of sellers unless and until aggrieved competitors such as petitioners here seek redress under the antitrust laws. In order to protect consumers, the ultimate beneficiary of our antitrust laws, competitors excluded from the market by an industrywide group boycott must be found to have suffered "antitrust injury" and have standing to enforce these laws in federal courts.

CFA's Insurance Group files this brief to bring to the Court's attention the crucial importance to consumers of

accurate information about prices and to express the insurance consumers' vital interest in reversing the decisions below. The petition does not adequately explain the critical stake of consumers. Further, CFA's Insurance Group specifically addresses how the decisions below present a potentially serious danger to all consumers if competitors who are precluded from serving those consumers by a nationwide group boycott may be denied standing to enforce the antitrust laws.

Respectfully submitted,

HOWARD M. METZENBAUM
United States Senator (Ret.)
Chairman of the Consumer
Federation of America
(Counsel of Record)

KATHLEEN F. O'REILLY
414 "A" Street, S.E.
Washington, D.C. 20003
Telephone: (202) 543-5068
Attorneys for *Amicus Curiae*
Consumer Federation of America's
Insurance Group

March 6, 1995

No. 94-1328

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

LEGAL ECONOMIC EVALUATIONS, INC.;
IBAR SETTLEMENT COMPANY; and
WEIL INSURANCE AGENCY, INC.
Petitioners,
vs.
METROPOLITAN LIFE INSURANCE COMPANY, et al.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* CONSUMER FEDERATION OF AMERICA'S INSURANCE GROUP IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

HOWARD M. METZENBAUM
United States Senator (Ret.)
Chairman of the Consumer
Federation of America
(Counsel of Record)
KATHLEEN F. O'REILLY
414 "A" STREET, S.E.
Washington, D.C. 20003
Telephone: (202) 543-5068
Attorneys for *Amicus Curiae*
Consumer Federation of
America's Insurance Group

TABLE OF CONTENTS

Page

I.

INTEREST OF THE AMICUS 1

II.

SUMMARY OF ARGUMENT 2

III.

ARGUMENT 5

A. Consumers Are Significantly Harmed By The Collusive Suppression Of Price Information By Competing Sellers 5

B. In Order To Protect Consumers, Petitioners Must Be Held To Have Suffered Antitrust Injury When Respondents Collusively Exclude Them From The Market Solely Because They Provided Accurate Price Information To Consumers 11

IV.

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

	Page
Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985)	11
Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990)	13
Bennett v. LaPere, 112 F.R.D. 136 (D.R.I. 1986)	10
Chicago Pro Sports Ltd. Partnership v. NBA, 961 F.2d 667 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 409	4
Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941)	12
Fed. Prescription Service v. Am. Pharmaceutical Ass'n, 484 F. Supp. 1195 (D.D.C. 1980), *aff'd in part*, 663 F.2d 253 (D.D.C. 1981), *cert. denied*, 455 U.S. 928 (1982)	7, 11
Fishman v. Estate Of Wirtz, 807 F.2d 520 (7th Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987)	12, 13
FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986)	6, 7, 11
FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990)	12
Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975)	10
Hartford Fire Ins. Co. v. California, ___ U.S. ___, 113 S. Ct. 2891 (1993)	12
Legal Economic Evaluations, Inc. v. Metropolitan Life Ins. Co., 39 F.3d 951 (9th Cir. 1994)	*passim*
Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311 (1965)	13
Monahan's Marine, Inc. v. Boston Whaler, Inc., 866 F.2d 525 (1st Cir. 1989)	13
National Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85 (1984)	7

TABLE OF AUTHORITIES

CASES

	Page
National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978)	6, 7, 9
Northwest Wholesale Stationers, Inc. v. Pacific Stationery And Printing Co., 472 U.S. 284 (1985)	12
Perma Life Mufflers v. Int'l Parts Corp., 392 U.S. 134 (1968)	13
Reiter v. Sonotone Corp., 442 U.S. 330 (1979)	13
Rothery Storage And Van Companies v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986)	12
United States v. Gasoline Retailers Ass'n, 285 F.2d 688 (7th Cir. 1961)	7
United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940)	5
Va. St. Bd. of Pharm. v. Va. Citizens Cons. Council, 425 U.S. 748 (1976)	6
Weil Ins. Agency v. Manufacturers Life Ins. Co., 815 F. Supp. 1320 (N.D. Cal. 1993)	*passim*

Other Authorities

Advisory Committee Notes to former Rule 26 of the Federal Rules of Civil Procedure, 1970 Amendment	10
Breyer, S., *Regulation And Its Reform* (1986)	6
Gerla, H., *Federal Antitrust Law And The Flow Of Consumer Information*, 42 Syracuse L. Rev. 1029 (1991)	7
Hindert, P., J. Dehner, P.J. Hindert, *Structured Settlements and Periodic Payment Judgments* (1994)	3, 8, 9, 10
Hovenkamp, H., *Antitrust's Protected Classes*, 88 Mich. L. Rev. 1 (1989)	13

TABLE OF AUTHORITIES

OTHER AUTHORITIES

	Page
Pitofsky, R., *Beyond Nader: Consumer Protection And The Regulation Of Advertising*, 90 Harv. L. Rev. 661 (1977)	6
Posner, R., *Regulation Of Advertising By The FTC* (1973)	6

No. 94-1328

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

LEGAL ECONOMIC EVALUATIONS, INC.;
IBAR SETTLEMENT COMPANY; and
WEIL INSURANCE AGENCY, INC.
Petitioners,
VS.
METROPOLITAN LIFE INSURANCE COMPANY, et al.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* CONSUMER FEDERATION OF AMERICA'S INSURANCE GROUP IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

I.

INTEREST OF THE *AMICUS*

Founded in 1968 to advance the consumer interest, Consumer Federation of America ("CFA") is a nonprofit association of more than 240 national, state and local organizations with a combined membership of 50 million Americans. The Chairman of CFA is Senator Howard M. Metzenbaum, retired member of the United States Senate and former Chair of the Antitrust, Monopolies & Business Rights subcommittee of the Senate Judiciary Committee.

A nonprofit organization, the National Insurance Consumer Organization ("NICO") was founded in 1980 as the only national consumer organization exclusively devoted to analyzing and advancing various insurance issues as they affect the consumer. Both CFA and NICO have provided consumer education on insurance issues and have advocated the interest of consumers of insurance in the development of public policy before regulatory and legislative bodies and the courts.

In January of 1995, NICO merged with CFA and is now known as CFA's Insurance Group. The CFA Insurance Group's director is J. Robert Hunter, an actuary as well as the founder and former president of NICO. Mr. Hunter recently served as Insurance Administrator of the State of Texas and formerly served as Federal Insurance Administrator under Presidents Ford and Carter. Both CFA and NICO have, over the years, received numerous complaints from consumers about insurance industry practices. The interest of CFA's Insurance Group and the consumers it represents in the first question presented by the petition for a writ of *certiorari* herein is fully described in the Motion accompanying this Brief.

II.

SUMMARY OF ARGUMENT

The use of annuities sold by life insurance companies to settle personal injury litigation has become an important tool in this country for providing periodic payments necessary to care for the rehabilitation and health of severely injured accident victims. Annuities assist the parties in settling tort litigation and, as a result, also help to unclog our overloaded court systems. As a reflection of its significance, the structured settlement annuity market approximates $4.6 billion in annuity premiums annually. P. Hindert,

J. Dehner, P.J. Hindert, *Structured Settlements and Periodic Payment Judgments*, § 103, 1-17 (1994).

It is undisputed for purposes of this petition that virtually the entire life insurance industry and its brokers have collaborated to prevent consumers of these annuities from having access to annuity prices by boycotting those competing brokers (such as petitioners) who provided accurate price information to annuity consumers. The insurance industry claims that personal injury victims are viewed by it "not merely as adversaries, but as potential clients for financial services and products [i.e., annuities]," P. Hindert, *supra*, § 1.05-1-38. Its members nonetheless attempted to justify their conspiracy to keep consumers in the dark about annuity prices on the basis that it would benefit the large institutional casualty companies that are often defendants in personal injury litigation. Concealed annuity prices, it is explained, provide the carriers with a negotiating advantage during settlement discussions. To the detriment of the consumers of these annuities, the legal system and ultimately society at large, the insurance industry's arguments have succeeded in the courts below.

The decisions below do not dispute but simply *ignore* the substantial harm caused to the insurance industry's "client" — the American consumer — by the industry's admitted conspiracy to withhold price information. (39 F.3d at 954-955; Pet. App. A at A-5, A-7; 815 F. Supp. at 1323; Pet. App. B at A-16.) Hence the courts below allow profound harm to annuity consumers to continue unabated and their decisions create unsound precedent which legitimizes competitors' agreements to prevent consumers from having access to the most basic and critical facts regarding products sold in the market place — their price.

Moreover, the decisions below represent a further restriction upon antitrust standing which will also significantly harm all consumers. The interest of consumers is paramount in determining whether competitors have suffered "antitrust injury" at the hands of their competitors:

> The antitrust injury doctrine . . . requires every plaintiff to show that its loss comes from acts that reduce output or raise prices to consumers. . . . Whenever producers invoke the antitrust laws *and consumers are silent*, this inquiry becomes especially pressing. [Citations omitted.] (Emphasis added.)

Chicago Pro Sports Ltd. Partnership v. NBA, 961 F.2d 667, 670 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 409 (J. Easterbrook). But consumers are *not* silent here. The insurance industry's exclusion of petitioners as competitors from the structured settlement annuity brokerage market, solely because they provided accurate price information to consumers, significantly harms annuity consumers and should be stopped.

The courts below indicated that neither consumers nor competitors could seek relief from the industry's nationwide boycott of petitioners. Unless *certiorari* is granted to correct those decisions, consumers will continue to be denied access to information which they need in order to make correct market decisions and the protection afforded consumers by the antitrust laws will be significantly eroded.

III.

ARGUMENT

A. Consumers Are Significantly Harmed By The Collusive Suppression Of Price Information By Competing Sellers

Virtually the entire life insurance industry admits the allegations of petitioners' complaint: that the industry concertedly excluded petitioners from the brokerage market only because petitioners wanted to provide accurate price information about annuity products to the ultimate consumer. This served to deny consumers — often severely injured accident victims — information that is vital to their pocketbook and personal health and which, more generally, is critical to the health of our free market economy. "Price is the central nervous system of our economy." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). This Court, in discussing the consumers' right to prescription drug prices, previously emphasized the importance of consumer access to accurate information about products which they need in order to care for their medical problems:

> As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate.... Those whom the suppression of prescription drug price information hits the hardest are the poor, the sick, and particularly the aged. A disproportionate amount of their income tends to be spent on prescription drugs; yet they are the least able to learn by shopping from pharmacist to pharmacist, where their scarce dollars are best spent. When drug prices vary as strikingly as they do, information as to who is charging what becomes more than a convenience. It could mean the alleviation of physical pain or the enjoyment of basic necessities.... Advertising,

> however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made from numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. [Citations omitted.]

Va. St. Bd. of Pharm. v. Va. Citizens Cons. Council, 425 U.S. 748, 763-766 (1976).

Here, accident victims who are unable to shop the life insurance market are hit especially hard. Moreover, the insurance industry's conspiracy thwarts the public interest in causing decisions regarding settlement annuity purchases to be distorted by misinformation. There is little dispute that consumers' pleas for adequate information about the products they need and use should be answered. *See, e.g.*, S. Breyer, *Regulation And Its Reform*, 26 (1986). Virtually all economists agree that a competitive and efficient market requires that consumers be given accurate information about competing products and prices. *See, e.g.*, R. Posner, *Regulation Of Advertising By The FTC*, 3-4 (1973); R. Pitofsky, *Beyond Nader: Consumer Protection And The Regulation Of Advertising*, 90 Harv. L. Rev. 661, 663, 670 (1977).

There is no doubt that a conspiracy between competitors to deny consumers information about annuity prices should be summarily condemned under the federal antitrust laws. *See, e.g., FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986) (dentists' suppression of x-ray information from insurers was summarily declared unlawful); *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978) (agreement among competitors to refuse to discuss prices

with potential customers was *per se* illegal); *Fed. Prescription Service v. Am. Pharmaceutical Ass'n*, 484 F. Supp. 1195 (D.D.C. 1980), *aff'd in part*, 663 F.2d 253 (D.D.C. 1981), *cert. denied*, 455 U.S. 928 (1982) (group boycott banning advertising by competing pharmacists was *per se* unlawful); *United States v. Gasoline Retailers Ass'n*, 285 F.2d 688 (7th Cir. 1961) (agreement between competing gasoline station operators to eliminate price advertising at the pump was *per se* illegal). "No court or commentator has yet to suggest a competitive benefit which could flow from withholding information." H. Gerla, *Federal Antitrust Law And The Flow Of Consumer Information*, 42 Syracuse L. Rev. 1029, 1032 (1991). Therefore, it would be not only ironic but also illogical and against public policy for this Court to protect the insurance industry from liability for its suppression of vital information from consumers. *See, FTC v. Indiana Federation of Dentists, supra.*

The reason that all of these courts have summarily condemned such conspiracies is plain enough: consumers suffer.

> A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal [consumer welfare] of antitrust law. Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit.

National Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 107 (1984). Here, the insurance industry's boycott of petitioners so as to create a price information "blackout" for annuity consumers naturally caused a decrease in the sale of such annuities. Personal injury claimants and their attorneys are understandably reluctant to settle their claims if they are not allowed to know the price of the annuity. Removing the consumer's

ability to compare prices indisputably resulted in higher prices (less value for their claim) to consumers.[1]

It is obvious that consumers of structured settlement annuities must have accurate annuity price information available to them in order to determine the real value of their annuity. Indeed, it is both ironic and significant that the industry's treatise explains that injury claimants and their attorneys should *always evaluate the price of any financial product used to fund a periodic payment obligation.* P. Hindert, *supra*, § 5.02[2], 5-5, 5.04[1], 5-51, 52 (emphasis supplied). Although the insurance industry sometimes allowed consumers to know the "present value" of the annuity payouts over time, this figure does not provide consumers with the actual value or price of the product. By allowing consumers access to annuity prices, petitioners — before the boycott was imposed — often increased annuity payouts to consumers at the same or lower price by shopping the annuity carriers. Moreover, petitioners' significant and undisputed pre-boycott success in brokering structured settlement annuities belies the Ninth Circuit's illogical characterization of them — and consumers — as not in the relevant market (39 F.3d at 955-956; Pet. App. A at A-8-9). Also, the pre-boycott use of structured settlement annuities when both personal injury victims and tort defendants knew annuity prices demonstrates that the information blackout is not what made the product "economically attractive" to litigants (39 F.3d at 955; Pet. App. A at A-8).

---

[1] Further, annuities used to fund settlements are only sold after both the personal injury claimant and the tort defendant agree to settle litigation by purchasing this insurance product. Hence settlement annuity brokers who assist insurance companies in selling these annuities are not aligned with "one side of the street" or the other. Rather, brokers must obtain the approval of "both sides of the street," personal injury victims and tort defendants, before they can sell an annuity that settles tort litigation.

The federal antitrust laws reflect Congress' judgment that "ultimately competition will produce not only lower prices, but also better goods and services." *National Soc'y of Professional Eng'rs v. United States,* 435 U.S. 679, 695 (1978). Congress thus recognized that "all elements of a bargain — quality, service, safety and durability — and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers." *Id.* Here, consumers are being denied access to the various prices of annuities. The courts below have simply disregarded Congress' judgment about the importance of fair competition.

Moreover, not only are consumers left "in the dark" about critical information concerning the financial aspects of a product which they desire but some brokers knowingly misrepresented to consumers that if they received information regarding annuity prices before they formally agreed to settle their cases, they would have "constructively received" the annuity and jeopardized the tax-free status of future annuity payments. The leading industry treatise explains that since 1983 it was clear to the insurance industry that tax benefits of structured settlement annuities were not endangered by the consumer's knowledge of annuity prices. P. Hindert, *supra*, § 203[2], 2-24. This industry deception has merely served to exacerbate the harm already sustained by tort victims who truly need structured settlement annuities.

Besides the harm caused to consumers of annuities, the harm to society in general caused by the insurance industry's boycott is acute. Structured settlements provide an important tool for unclogging our courts and effectively allocating resources for the care of countless injured persons. However, structured settlements will not be optimally effective unless consumers are allowed full knowledge of annuity prices:

> Periodic payment presents an opportunity to substantially improve the traditional tort system. . . . Only if

> both sides of the litigation understand the transaction(s), keep open minds, analyze the claimant's needs, and disregard destructive myths and allusions will periodic payment reach the potential and provide the benefits of which it is ever so capable.

P. Hindert, § 1.05, 1-38. The only proffered excuse for the insurance industry's boycott was that it was not "anticompetitive" because tort defendants, mostly casualty companies, could gain a negotiating advantage in settlement discussions over personal injury victims by not disclosing all relevant facts to them. (815 F. Supp. at 1323; Pet. App. B at A-16.) That excuse runs contrary to fundamental notions of due process as well as the rules of discovery and settlement in civil litigation. See Advisory Committee Note to Former Federal Rule of Civil Procedure 26 (settlements should be based on knowledge, not speculation). By thus blindfolding the structured settlement annuity consumers during settlement negotiations, the insurance industry's price information boycott subverts justice:

> So long as the policy of the Rules is the promotion of the 'just, speedy and inexpensive' resolution of cases, then fair settlements must always be encouraged. Fairness cannot be achieved where one side is needlessly blindfolded.

Bennett v. LaPere, 112 F.R.D. 136, 141 (D.R.I. 1986). Moreover, the sale of annuities by nonparties to personal injury litigation (the life insurance companies) for the ultimate consumers' use and benefit must be regarded as commerce within the reach of the antitrust laws. *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975). Otherwise, all consumers of products or services used in connection with litigation would be provided no protection by the antitrust laws.

This Court should grant *certiorari* to address the first question presented by the petition, correct the decisions below and reaffirm that competitors may never collusively exclude competitors in order to suppress critical information—especially about prices—from consumers.

B. In Order To Protect Consumers, Petitioners Must Be Held To Have Suffered Antitrust Injury When Respondents Collusively Exclude Them From The Market Solely Because They Provided Accurate Price Information To Consumers

The insurance industry's nationwide refusal to deal with petitioners and similar brokers solely because these brokers wanted to provide accurate prices to the public constitutes unlawful exclusionary conduct precisely because consumers (as well as competitors) were significantly injured. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) ("[t]he question was whether [the defendant's] conduct may properly be characterized as exclusionary cannot properly be answered by simply considering its effect on [the plaintiff]. In addition, it is relevant to consider its impact on consumers . . ."). As discussed above, courts have consistently and summarily condemned as violations of the antitrust laws joint efforts by competitors to withhold information from the public. However, it is similarly true that, *in order to protect consumers,* competitors who are directly excluded from the market by such a conspiracy — and therefore are denied the opportunity to bring lower prices and better products to consumers — must have standing under the antitrust laws to seek redress. *See, e.g., Fed. Prescription Services, Inc. v. Am. Pharmaceutical Ass'n,* 484 F. Supp. 1195, 1707 (D.D.C. 1980) (competing pharmacists were victims of a *per se* unlawful group boycott by competitors). Thus if a dentist had attempted to defy the unlawful information blackout imposed by his competitors in *Indiana Federation Of Dentists, supra,* and was thereby

excluded from the market by those competitors, that dentist surely would have suffered antitrust injury and would therefore have standing to complain about it. Competitors like petitioners must have antitrust standing, in short, to protect and promote consumers' welfare.

The antitrust laws' ban of group boycotts against competitors is ultimately designed to protect consumers. *Rothery Storage And Van Companies v. Atlas Van Lines, Inc.*, 792 F.2d 210, 228 (D.C. Cir. 1986); *Fishman v. Estate Of Wirtz*, 807 F.2d 520, 567 (7th Cir. 1986) (J. Easterbrook dissenting), *cert. denied*, 479 U.S. 1033 (1987). Industry-wide group boycotts are unlawful because they eliminate competitors, thereby tending to usurp consumer preference and to create monopolies. *See, e.g., Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1941). Here, a boycott implemented by the entire insurance industry in order to cut off competitors' access to information needed to compete — retail price information about annuities — plainly hurts consumers as well as competitors and should be summarily condemned even considering this Court's latest more penetrating review of group boycotts. *See, e.g., Northwest Wholesale Stationers, Inc. v. Pacific Stationery And Printing Co.*, 472 U.S. 284 (1985) (boycott by those with market power is *per se* unlawful); *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) (agreement among competing attorneys not to provide services until prices increased was a classic *per se* unlawful restraint of trade); *See also Hartford Fire Ins. Co. v. California*, ____ U.S. ____, 113 S. Ct. 2891, 2913 (1993) (insurance boycott unlawful because it sought the joint forbearance of sales).

Hence the Ninth Circuit's holding that direct competitors harmed by a nationwide predatory agreement which also directly harms consumers have not suffered "antitrust injury" as a matter of law is clearly wrong. It perverts this

Court's decision in *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990). The industrywide group boycott instituted by the insurance industry against petitioners was unquestionably an "anticompetitive" aspect of the insurer's scheme precisely because it so clearly harmed consumers.

The antitrust laws are designed, most fundamentally, to protect consumers. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (Congress designed the Sherman Act as a "consumer welfare prescription"); *Monahan's Marine, Inc. v. Boston Whaler, Inc.*, 866 F.2d 525, 528 (1st Cir. 1989) (consumers are Sherman Act's ultimate beneficiaries); *Fishman v. Estate of Wirtz*, 807 F.2d 520, 535-536 (7th Cir. 1986) ("We agree that the enforcement of consumer welfare is an important policy — probably the paramount policy — in forming the antitrust laws."). But if competitors who are excluded by unlawful conduct which also harms consumers are denied antitrust redress, the most effective weapon for protecting consumers — private antitrust enforcement litigation — will become virtually useless. *See, e.g., Perma Life Mufflers v. Int'l Parts Corp.*, 392 U.S. 134 (1968) ("The purpose of the antitrust laws are best served by insuring that the private action will be an ever present threat to anyone contemplating business behavior in violation of the antitrust laws."); *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965) (private antitrust litigation is "one of the surest weapons for effective enforcement of the antitrust laws."). Competitors, like petitioners here, often are the best enforcers of the antitrust laws because they first learn about anticompetitive conduct. H. Hovenkamp, *Antitrust's Protected Classes*, 88 Mich. L. Rev. 1, 31 (1989). ("Competitors are often the most efficient enforcers of the antitrust laws, for they are in a position to catch monopolistic activity much earlier than are consumers.")

Finally, the courts below already have decreed that annuity consumers do not have standing to complain under the antitrust laws. If the decisions below are not reversed so as to allow petitioners to seek antitrust redress, the insurance industry will be free to continue their plainly anticompetitive conduct with impunity. More generally, to protect all consumers, competitors who are attempting to bring efficiency to markets should not be denied antitrust standing—especially summarily—when they are the victims of the predatory actions of their competitors. If the decisions below are not reversed, the fundamental goal of our antitrust laws in promoting consumer welfare will be jeopardized.

IV.

CONCLUSION

The insurance industry's nationwide conspiracy to prevent insurance consumers from having access to annuity price information cannot be excused and therefore must be stopped. Moreover, the only way consumers can obtain protection here — and in many other cases like this — is on the backs of competitors who have been directly injured by such schemes. Unless *certiorari* is granted with regard the first question presented by the petition, the insurance industry's Sherman Act violations will continue unabated and a practice which should be summarily condemned will be officially sanctioned. On behalf of consumers, CFA's Insurance Group urges *certiorari* with respect to this important question.

Respectfully submitted,

HOWARD M. METZENBAUM
United States Senator (Ret.)
Chairman of the Consumer
Federation of America
(Counsel of Record)

KATHLEEN F. O'REILLY
414 "A" Street, S.E.
Washington, D.C. 20003
Telephone: (202) 543-5068
Attorneys for *Amicus Curiae*
Consumer Federation of America's
Insurance Group

March 6, 1995

(4)

No. 94-1328

FILED
MAR 17 1995
OFFICE OF THE CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1994

LEGAL ECONOMIC EVALUATIONS, INC.;
IBAR SETTLEMENT COMPANY; and
WEIL INSURANCE AGENCY, INC.
Petitioners,

vs.

METROPOLITAN LIFE INSURANCE COMPANY, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

EUGENE CREW
(Counsel of Record)
DANIEL J. FURNISS
PAUL F. KIRSCH
THEODORE T. HERHOLD
TOWNSEND AND TOWNSEND
KHOURIE AND CREW
One Market Plaza
Steuart Tower, 20th Floor
San Francisco, CA 94105
(415) 543-9600
Attorneys for Petitioners

Bowne of Los Angeles, Inc., Law Printers (213) 627-2200

BEST AVAILABLE COPY

14 pp

TABLE OF CONTENTS

		Page
I.	INTRODUCTION	1
II.	ARGUMENT	2
	A. Respondents' Claim, That A Direct Victim Of A *Per Se* Unlawful Group Boycott May Not Show "Antitrust Injury," Demonstrates The Need For *Certiorari*	2
	B. Respondents Now Disavow The *Undisputed* Facts Of This Case	4
	C. Respondents Concede The Question Of Whether A Federal Court Has Discretion To Abstain From Deciding "Exclusive Jurisdiction" Claims Is Both Unresolved And Important	8
III.	CONCLUSION	10

TABLE OF AUTHORITIES

Cases

	Page
Allied Machinery Ser., Inc. v. Caterpillar Inc., 841 F. Supp. 406 (S.D. Fla. 1993)	8
Atlantic Richfield Co. v. USA Petroleum, 495 U.S. 328 (1990)	1
Brillhart v. Excess Ins. Co., 316 U.S. 491 (1942)	8
Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977)	2, 3
Eichman v. Fotomat Corp., 759 F.2d 1434 (9th Cir. 1985)	9
FTC v. Indiana Federation of Dentists, 476 U.S. 447 (1986)	6
FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990)	4
General Utils. & Operating Co. v. Helvering, 296 U.S. 200 (1935)	5
Kartell v. Blue Shield of Mass., Inc., 592 F.2d 1191 (1st Cir. 1979)	8-9
Klein v. Walston & Co., 432 F.2d 936 (2d Cir. 1970)	8
Legal Economic Evaluations, Inc. v. Metropolitan Life Ins. Co., 39 F.3d 951 (9th Cir. 1994)	*passim*
Lorentzen v. Levelor Corp., 754 F. Supp. 987 (S.D.N.Y. 1990)	8
Manufacturers Life Ins. Co. v. Superior Court, 27 Cal. App. 4th 67 (1994)	9
Marrese v. American Acad. of Orthopaedic Surg., 470 U.S. 373 (1985)	9
Motolese v. Kaufman, 176 F.2d 301 (2d Cir. 1949)	8
SAS of Puerto Rico v. Puerto Rico Tele. Co., No. 94-1711 (1st Cir. Feb. 21, 1995) (U.S. App. LEXIS 3298)	3
Tafflin v. Levitt, 493 U.S. 455 (1990)	9

TABLE OF AUTHORITIES

CASES

	Page
Thompson v. Metropolitan Multi-List, Inc., 934 F.2d 1566 (11th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 295 (1992)	3, 6
Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978)	8
Yellow Pages Cost Consultants, Inc. v. GTE Directories Corp., 951 F.2d 1158 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1947 (1992)	3, 6

Statutes

15 U.S.C. § 15	4

Other Authorities

The Compact Edition of the Oxford English Dictionary, Volume 1 (1971)	6
Rehnquist, J., *Taking Comity Seriously: How To Neutralize The Abstention Doctrine*, 46 Stanford L. Rev. 1049 (1994)	9
Webster's Third New International Dictionary, Unabridged (1976)	6

No. 94-1328

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

LEGAL ECONOMIC EVALUATIONS, INC.;
IBAR SETTLEMENT COMPANY; and
WEIL INSURANCE AGENCY, INC.,
Petitioners,

vs.

METROPOLITAN LIFE INSURANCE COMPANY, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully submit this reply brief in support of their Petition for Writ of Certiorari (the "petition").

I. INTRODUCTION

Respondents oppose review of the first question presented by the petition, claiming that to "allow competitors injured by a group boycott to pursue antitrust remedies" would require the Court to "carve out an exception to the antitrust injury" doctrine. (Opp. 22) This is a dangerous misstatement of the law and further demonstrates the need for review by this Court. See *Atlantic Richfield Co. v. USA Petroleum*, 495 U.S. 328, 339 (1990) ("*ARCO*") (instructing that an antitrust plaintiff injured by its competitors' joint "predatory" conduct would suffer "antitrust injury"). Unless certiorari is granted and the lower courts' decision vacated, all intended victims of *per se* unlawful predatory conduct could easily be denied redress. The clear result will be irreparable harm to competition — here, fraudulently induced settlement annuities and less annuity funded settlements of tort litigation.

Regarding the second question for review, respondents admit this Court has not "resolved the issue of applicability of *Colorado River* abstention to cases involving exclusive federal jurisdiction." (Opp. 24) Moreover, respondents' justification for denial of a federal court's discretion to abstain from adjudicating federal antitrust claims contradicts opinions of this Court and decisions from other Circuits and promotes the inefficient allocation of judicial resources.

Finally, respondents manipulate the *undisputed* record in order to fabricate issues of fact which do not exist. None of respondents' contentions is sufficient to preclude this Court's review of the important questions presented here.

II. ARGUMENT

A. Respondents' Claim, That A Direct Victim Of A *Per Se* Unlawful Group Boycott May Not Show "Antitrust Injury," Demonstrates The Need For Certiorari

Respondents boldly assert: "The Finding Below That The Direct Victim Of A Group Boycott Did Not Sustain Antitrust Injury Does Not Present A Radical Departure From Settled Legal Principles." (Opp. 20) This oxymoron — that a "direct victim" of an unlawful "group boycott" does not sustain "antitrust injury" — demonstrates the need for *certiorari* here for it shows how far respondents will go to bar admitted victims of admitted violations access to the courts. Respondents' nationwide group boycott, which deliberately excluded petitioners from the annuity brokerage market — cutting off access to critical information needed to compete (annuity rates) — was clearly "predatory." Moreover, a competitor excluded by a *per se* unlawful group boycott which respondents imposed so as to euchre injury victims out of adequate disability payments, consequently discouraging the voluntary settlement of injury claims, is injured by an "anticompetitive aspect" (*Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977)) of respondents' conduct and therefore suffers "antitrust injury."[1]

Respondents expressly admit that petitioners "indeed sustain antitrust injury if the restriction on competition flowing from the boycott extends beyond the excluded competitor [i.e., petitioners] to cause injury to consumers in the market through increased prices, decreased output or other restrictions on the market." (Opp. 22) But that consumer injury is precisely what petitioners have alleged and proven and is precisely the consumer injury which the Consumers Federa-

---

[1] Significantly, respondents do not deny their conduct was a *per se* unlawful group boycott of petitioners or that respondents' boycott resulted in "over-priced" (Opp. 8) annuities (thus harming both tort plaintiffs *and* tort defendants) and a decrease in the number of structured settlement annuities that were sold.

tion of America stressed in its *amicus curiae* brief to this Court. Respondents cannot deny that obvious consumer harm, so they just assume it away. Petitioners readily acknowledge that every antitrust plaintiff must show antitrust injury, but that is not the question presented. The question here is whether petitioners satisfy that requirement, i.e., whether boycottees suffer injury "of the type which the antitrust laws" prohibiting boycotts "were intended to prevent." *Brunswick*, 429 U.S. at 489. The lower court's endorsement of respondents' contention that a victim of a group boycott cannot prove antitrust injury as a matter of law because the boycott victim's injury does not "flow from" injury to competition deserves this Court's review. (39 F.3d at 955; App. at A-7.)

Respondents would have this Court believe that "antitrust injury" law is fully settled and free of conflict and that lower courts have "consistently interpreted and applied the antitrust injury requirement." (Opp. 16) Yet contrast, for example, the lower court's decisions here with *Yellow Pages Cost Consultants, Inc. v. GTE Directories Corp.*, 951 F.2d 1158 (9th Cir. 1991), *cert. denied*, ____ U.S. ____, 112 S. Ct. 1947 (1992) (advertising brokers competed in relevant markets because they had the ability to take business from defendant and therefore suffered antitrust injury from their unlawful exclusion) and *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566 (11th Cir. 1991), *cert. denied*, ____ U.S. ____, 112 S. Ct. 295 (1992) (real estate broker suffered antitrust injury because he was excluded as competitor by a group boycott). The confusion and uncertainty engendered by the related doctrines of antitrust injury and standing continue to perplex the lower courts. This is exemplified most recently by the First Circuit's decision in *SAS of Puerto Rico v. Puerto Rico Tele. Co.*, No. 94-1711 (1st Cir. Feb. 21, 1995) (U.S. App. LEXIS 3298). Decrying this "confusion" among the Circuits in coping with the nettlesome "antitrust injury" requirement, the Court of Appeals observed:

> Despite its statutory framework, antitrust law is largely the handiwork of federal judges and antitrust enforcers,

> and the resulting case law offers much to admire. The corner of antitrust law with which we are concerned here is an exception. As one commentator has observed, 'the courts have never been able to create an intelligible theory of private antitrust standing capable of being applied across the full range of potential cases.' (citations omitted).

To defeat certiorari, respondents string-cite a batch of lower court decisions for the notion that courts routinely deny antitrust injury to intended victims of group boycotts (Opp. 16, 20). None of those decisions so holds. All of them merely held either that plaintiffs suffered no injury whatsoever (e.g., *OK Sand*) or that plaintiffs failed to show injury to consumers (e.g., *Stamakis*) or that plaintiffs failed to show injury to competition (e.g., *Les Schockley*). Here, petitioners have shown (and respondents do not deny) that respondents' admitted group boycott caused injury to both competitors and consumers and, since respondents' boycott is a *per se* violation, injury to competition (in the very market from which petitioners were excluded) is conclusively presumed (*FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990)).[2]

If the Court does not grant review of this important question, the lower courts' expansion of this Court's antitrust injury requirement will serve to bar competitor victims of group boycotts from the courts. Consumers, as well as competitors, will have thus lost the protection which Congress deemed important in passing the Clayton Act (15 U.S.C. § 15).

B. Respondents Now Disavow The *Undisputed* Facts Of This Case

Respondents stipulated to the facts alleged in the complaints for summary judgment purposes — including the fact that petitioners were successful competitors in the annuity broker-

---

[2] Injury to competition was also demonstrated to the courts below by substantial evidence and was not disputed by the Ninth Circuit. (39 F.3d 954-955; App. at A-5, 7)

age market before the boycott. However, to the Ninth Circuit and now to this Court, respondents deny those facts in order to cling to the erroneous summary judgment they obtained. Respondents are estopped to disavow their stipulations and reverse their positions whenever it suits their purposes. *General Utils. & Operating Co. v. Helvering*, 296 U.S. 200 (1935) (Court of Appeals opinion summarily reversed because it decided an inference of fact directly in conflict with the parties' stipulation). They should not be allowed to thwart Supreme Court review by such tactics.

Thus respondents argued to the District Court initially that exclusion of petitioners from the annuity brokerage market alleged in the complaints was not "anticompetitive" because it may have benefitted tort defendants. Because the District Court showed an interest in an alternative theory at the initial hearing — i.e., that life insurance companies' annuity prices were "attorney work product" — respondents quickly switched to that argument. Although it was clear error, they succeeded. Then, in the Ninth Circuit and here, instead of defending their initial argument or even the one that prevailed in the District Court, respondents shifted again — now contending that petitioners were not even in the relevant market to sell or broker annuities — the very market from which respondents originally had *stipulated* petitioners were excluded.

Respondents' opposition also falsely depicts the relevant market to sell annuities as consisting only of tort defendant *brokers* — who may sell annuities — and tort plaintiff *consultants* — who may only advise tort plaintiffs regarding settlement but may not sell annuities to fund settlements. (Opp. 3-4) However, this reflects the status of the structured settlement annuity market only after respondents' successful boycott of petitioners as brokers and therefore reflects the effects of their boycott.[3] Respondents cannot use their unlawful boycott

---

[3] Although the Ninth Circuit ultimately ignored these undisputed facts, it recognized that petitioners complained that respondents drove petitioners out of the "annuity *brokerage*" market. (39 F.3d 953; App. at A-3)

to exclude petitioners from the market and then cite petitioners' exclusion as proof that petitioners are not in the market and therefore suffer no antitrust injury.[4]

Respondents also seek to defeat review by contending that tort defendants, usually casualty insurers, are the sole "consumers" of annuities. (Opp. 8) Again, respondents are wrong. They ignore the fact that tort defendants do not receive the annuity payments and cannot purchase any annuity without tort plaintiffs' approval. Without tort injury victims, the market for this financial commodity which provides funds for long-term medical care simply would not exist. Tort plaintiffs "use" the annuities which tort defendants exchange in return for a release of the tort victim's injury claim. A "consumer" is defined as "one that *utilizes* economic goods," (Webster's Third New Int'l Dictionary, Unabridged (1976) (emphasis added)) or "one who uses up an article produced, thereby exhausting its exchangeable value," The Compact Edition of the Oxford English Dictionary, Volume 1 (1971). This term applies to tort plaintiffs, *not* tort defendants. At a minimum, both tort plaintiffs and tort defendants — who must agree to the purchase of a specific annuity in order to settle litigation — should be considered "consumers" of these annuities. *See, e.g., FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986) (*both* patients and insurers were "consumers" of dental services).[5]

---

[4] Respondents' argument that petitioners cannot suffer antitrust injury because they are mere "brokers" is also plain error. Courts routinely hold that "brokers," including advertising and real estate — if they compete in the relevant market — can sustain antitrust injury. *See, e.g., Yellow Pages, supra* and *Thompson, supra.*

[5] Moreover, respondents ignore the fact that both of these consumers (i.e., tort plaintiffs *and* tort defendants) are harmed by the boycott which undisputedly increased prices and decreased output. Respondents also ignore the substantial evidence that disclosure of accurate annuity price information to the injury victims often resulted in the placement of annuities which produced greater payouts to tort plaintiffs at *lower* premium cost to tort defendants.

Finally, contrary to respondents' unsupported allegations, the District Court's conclusion — that prices of an annuity sold by a third party and purchased by tort litigants only after they have agreed to settle their litigation constitute tort defendants' privileged or confidential "negotiating strategy" (Opp. 23) — is also wrong.[6] Respondents have no authority for their continuing assertion that third party life insurers' annuity prices constitute some inchoate property right of tort defendants.[7] Removal of this unfortunate precedent in the published District Court decision is another reason to review the decisions below.

Hence, contrary to respondents' opposition, this petition rests upon *stipulated* facts which allow the Court to address squarely the important legal issues at stake.[8]

---

[6] After petitioners' state law claims were remanded by the District Court to state trial court, the state trial court examined the records of respondents' brokers and determined that life insurance companies' annuity prices were "a mere collection of data created and supplied by third party commercial enterprises [life companies] . . . [which do] not reflect any mental process, strategies, or impressions of defense counsel, or [a broker] . . . . [T]his factual data originating with a third party life insurer is *completely unprivileged.*" (Super. Court Order dated August 1, 1994 at 21:10-16) (Emphasis added).

[7] Further, respondents' depiction of brokers as only "allowed" to disclose annuity prices to tort plaintiffs with tort defendants' "approval" (Opp. 4) describes the inefficient market resulting from the boycott. Before the boycott, petitioners — or any structured settlement broker — could and did obtain annuity rates from life insurance companies on behalf of *either* tort plaintiffs or tort defendants.

[8] Space limitations preclude petitioners' detailed response to each of the alleged "misstatements" which respondents impute to petitioners. Respondents' claim, that petitioners distort the rulings below, is patently false.

C. Respondents Concede The Question Of Whether A Federal Court Has Discretion To Abstain From Deciding "Exclusive Jurisdiction" Claims Is Both Unresolved And Important

Respondents admit "this Court has not finally resolved the issue of applicability of *Colorado River* abstention to cases involving exclusive federal jurisdiction." (Opp. 24) Nor do respondents dispute the substantial importance — to the doctrine of abstention generally — of determining whether courts having exclusive jurisdiction nonetheless also have discretion not to adjudicate claims if the circumstances warrant. Hence the important and discrete legal issue presented by this petition is not (as respondents imply) whether the District Court abused its discretion in refusing to abstain but whether the Ninth and Seventh Circuits, in contrast with other Circuits, are correct in concluding that district courts have no discretion to even *consider* abstention as to any claims within their "exclusive" jurisdiction.[9]

Respondents summarily dismiss, as "not persuasive" (Opp. 25), authorities cited by petitioners which demonstrate there is a split of authority both within and among the Circuits regarding whether district courts have such discretion. However, as the most recent cases on this issue indicate, opinions of this Court and other Circuits plainly suggest that courts do possess requisite discretion to abstain from adjudicating exclusive jurisdiction claims in appropriate circumstances.[10]

---

[9] Respondents also minimize the importance of this issue by falsely characterizing petitioners as "forum shoppers" even though respondents do not dispute they originally agreed with petitioners and stipulated in the District Court to stay these "exclusive" claims in the interests of judicial efficiency.

[10] *See, e.g., Allied Machinery Ser., Inc. v. Caterpillar Inc.*, 841 F. Supp. 406 (S.D. Fla. 1993), and *Lorentzen v. Levelor Corp.*, 754 F. Supp. 987 (S.D.N.Y. 1990). These decisions cite *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 (1978); *Brillhart v. Excess Ins. Co.*, 316 U.S. 491 (1942); *Klein v. Walston & Co.*, 432 F.2d 936 (2d Cir. 1970); *Motolese v. Kaufman*, 176 F.2d 301 (2d Cir. 1949) (L. Hand, C.J.); *Kartell v. Blue Shield of Mass.*,

The essence of respondents' argument is that review should be denied because Congress decreed Sherman Act claims within a federal court's "exclusive," rather than "concurrent." jurisdiction. (Opp. 26) Again, respondents are wrong.[11] Respondents also miss the mark when they argue that a "substantial doubt" as to whether the state court will finally resolve the issues between the parties justifies denial of review. *First:* this contention ignores the basic question of whether discretion exists. *Second:* it contradicts the state Court of Appeal decision. *See, e.g., Manufacturers Life Ins. Co. v. Superior Court*, 27 Cal. App. 4th 67, 84 (1994), review pending (App. at A-51) (ruling that, if respondents' denial of state court jurisdiction over petitioners' antitrust claims were to prevail, California would "stand alone in opposition to general law throughout the country"). Respondents' argument thus begs the important question presented, ignores judicial comity and promotes the inefficient allocation of federal (and state) courts' resources.[12]

Inc., 592 F.2d 1191 (1st Cir. 1979), which support their conclusion that federal courts have discretion to abstain from adjudicating claims within their "exclusive" jurisdiction. The decision below, as well as those in the Seventh and Second Circuits, concededly disagree with the decisions cited above. However, that is good reason to grant-not deny-review.

[11] *See, e.g., Tafflin v. Levitt*, 493 U.S. 455, 471 (1990) (J. Scalia, concurring) declared there is "less than compelling" reasons for considering Sherman and Clayton Act claims as "exclusive" since Congress did not expressly confer exclusive jurisdiction); J. Rehnquist, *Taking Comity Seriously: How To Neutralize The Abstention Doctrine*, 46 Stanford L. Rev. 1049, 1102 (1994) (describing the "dubious nature" of federal court's "obligation" to exercise jurisdiction).

[12] Respondents are wrong that petitioners' federal antitrust claims would still have to be adjudicated after petitioners' state antitrust claims have been adjudicated in state court. *Marrese v. American Acad. of Orthopaedic Surg.*, 470 U.S. 373, 386 (1985); *Eichman v. Fotomat Corp.*, 759 F.2d 1434, 1437 (9th Cir. 1985).

III. CONCLUSION

For the reasons stated above and in the petition, the writ of certiorari should issue with regard to both questions presented.

Respectfully submitted,

EUGENE CREW
(Counsel of Record)
DANIEL J. FURNISS
PAUL F. KIRSCH
THEODORE T. HERHOLD
TOWNSEND AND TOWNSEND
KHOURIE AND CREW
One Market Plaza
Steuart Tower, 20th Floor
San Francisco, CA 94105
Telephone: (415) 543-9600
Attorneys for Petitioners

March 15, 1995